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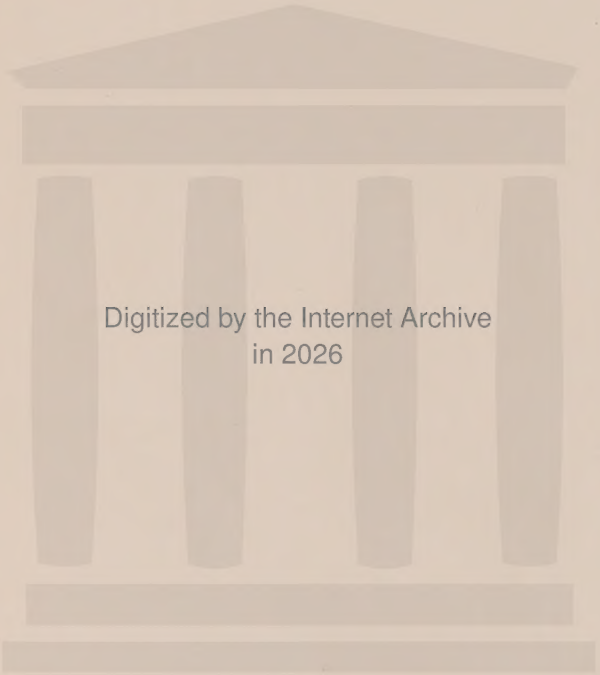
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THE LAW OF EVIDENCE.

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POWELL'S

Principles and Practice

OF THE

LAW OF EVIDENCE.

TENTH EDITION

BY

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PREFACE

TO THE TENTH EDITION.

THE original edition of this well-known treatise on the Law of Evidence was written in 1856 by Mr. Edmund Powell, who also brought out the second edition. The next six editions were produced by Mr. John Cutler with the assistance of Mr. E. F. Griffin and Mr. C. F. Cagney. The time then came for the book to be entirely re-cast and re-written. It was accordingly carefully revised and brought up to date. It was rearranged under the four main heads of Relevancy, Proof, Cogency, and Procedure; the greater portion of the books on Relevancy and Cogency was entirely new matter.

This ninth edition appeared in 1910, and is now out of print. During the intervening ten years there have been many important statutes and decisions which have affected the law of evidence. These have been carefully noted. The Appendix has also been revised and considerably reduced in bulk, as it was found possible to omit many statutes which have now been repealed or modified.

WILLIAM BLAKE ODGERS.
WALTER BLAKE ODGERS.

15, OLD SQUARE,
LINCOLN'S INN, W.C.
January, 1921.

TABLE OF CONTENTS.

PAGE

PREFACE TO THE TENTH EDITION v

TABLE OF CASES xiii

TABLE OF STATUTES lxvii

TABLE OF RULES OF THE SUPREME COURT, 1883 . . . lxxv

INTRODUCTION 1–28

GENERAL PRINCIPLES 1

I. Relevancy 3

II. Proof 6

III. Cogency 13

IV. Procedure 18

(a) Criminal Proceedings 19

(b) Civil Proceedings 23

BOOK I.

RELEVANCY.

CHAP.

I.—GENERAL PRINCIPLES 29–36

II.—WHAT THIRD PERSONS THINK 37–52

Evidence of Opinion 37

I. Evidence of Experts 39

(a) Medical Questions 41

(b) Mercantile, Commercial, and Professional Questions 42

(c) Handwriting 44

(d) Foreign Law 48

II. Opinion Evidence of Non-experts . . . 50

III.—WHAT THIRD PERSONS DID OR SAID BEHIND THE BACK OF A PARTY 53–82

I. What Third Persons did 53

II. What Third Persons said 61

CHAP. PAGE
IV.—WHAT THIRD PERSONS DID OR SAID TO OR IN THE PRESENCE OF A PARTY 83–91
V.—WHAT THE PARTIES DID OR SAID IN THE TRANSACTION (INCLUDING CONFESSIONS) . . . 92–104
VI.—WHAT THE PARTIES DID OR SAID IN OTHER TRANSACTIONS 105–124
1. Acts of Ownership 106
2. Facts showing System 111
3. Facts showing the State of Mind of a Party . 113
4. Facts showing Identity 119
General Evidence of Character 119

BOOK II.

PROOF.

I.—DIFFERENT KINDS OF PROOF 125–133
II.—BURDEN OF PROOF 134–148
III.—EVIDENCE, ORAL AND DOCUMENTARY . . . 149–169
IV.—WITNESSES: COMPETENCY: OATH AND AFFIRMATION 170–190
Husbands and Wives 181
Mental Incompetency 185
Incompetency from Defect of Religious Belief . 188
V.—PRIVILEGE OF WITNESSES 191–210
1. Criminating Questions 192
2. Admissions of Adultery 199
3. Matrimonial Communications 200
4. Communications with Members of the Legal Profession 201
5. Disclosures Prejudicial to the Public Interest . 209
VI.—PROOF OF PUBLIC DOCUMENTS 211–236
Acts of Parliament and Parliamentary Papers . 217
Records and other Judicial Proceedings . . 218
Convictions 220
Bankruptcy Proceedings 221
Charitable Trusts 222
Foreign and Colonial Judgments, etc. . . . 222
Probate Copy of a Will 222
Non-judicial Records 224

CHAP. PAGE

VI.—PROOF OF PUBLIC DOCUMENTS—*continued.*
Documents belonging to a Corporation . . . 225
Bye-laws 226
Public Registers 226
Privilege of Public Documents 233
VII.—PROOF OF PRIVATE DOCUMENTS 237–260
I. Private Documents less than Thirty Years Old which are not required by Law to be Attested 237
II. Private Documents less than Thirty Years Old which are required by Law to be Attested . 239
III. Documents Thirty Years Old 243
Privilege of Documents when Produced at the Trial 248
Stamp Objections, etc. 254
VIII.—SECONDARY ORAL EVIDENCE 261–306
Hearsay 263
Declarations against Interest 265
Declarations Made in the Course of Duty . . 273
Evidence in a Former Proceeding 278
Depositions 280
Declarations as to Public and General Rights . 291
Declarations in Pedigree Cases 299
Declarations by a Patient as to his Symptoms . 304
IX.—SECONDARY DOCUMENTARY EVIDENCE . . 307–323
X.—REAL EVIDENCE 324–330
XI.—PRESUMPTIONS 331–361
Presumption of Regularity 336
Presumption of Lawful Origin 344
Presumption of Innocence 348
Presumption of Intention 351
Presumption against a Wrongdoer 353
Presumption of Continuance 355
XII.—ADMISSIONS 362–384
I. Formal Admissions 364
On the Pleadings 364
In Answer to Interrogatories 366
On Notice to Admit Facts 367
On Notice to Admit Documents . . . 368
Admissions by Solicitors 369
Admissions by Counsel 370
II. Informal Admissions 371
XIII.—ESTOPPELS 385–418
I. Estoppel by Record 388

CHAP. PAGE

XIII.—ESTOPPELS—*continued.*

I. Estoppel by Record—*continued.*

Judgments *in rem* 389

Judgments *in personam* 391

Foreign Judgments 399

II. Estoppel by Deed 402

III. Estoppel by Conduct 404

BOOK III.

COGENCY.

I.—WEIGHT OF EVIDENCE 419–429

Direct and Circumstantial Evidence . . . 423

Oral, Documentary, and Real Evidence . . . 425

Primary and Secondary Evidence 427

II.—HOW TO TEST THE VERACITY OF A WITNESS . . 430–445

III.—CORROBORATION 446–455

IV.—EXAMINATION OF WITNESSES 456–472

I. Examination-in-Chief 457

II. The Cross-Examination 463

III. The Re-Examination 469

V.—CONSTRUCTION OF DOCUMENTS 473–510

Wills and Deeds 491

Grants and Contracts 499

Indictments 501

Statutes 502

BOOK IV.

PROCEDURE.

I.—PROCEDURE IN CRIMINAL CASES 511–531

Witnesses 511

Documents and Things 516

The Trial of an Indictment 518

Functions of Judge and Jury 524

Evidence in the Court of Criminal Appeal . . 527

II.—DISCOVERY IN CIVIL ACTIONS 532–566

Interrogatories 536

Discovery of Documents 547

Affidavit of Documents 552

Documents Privileged from Production . . . 553

Production and Inspection of Documents . . 561

CHAP. PAGE
III.—PROCURING EVIDENCE 567–596
Advice on Evidence 567
Attendance of Witnesses 571
Commissions and Letters of Request . . . 582
Notices to Produce and to Admit 589
IV.—TRIAL OF A CIVIL ACTION 597–615
Evidence by Affidavit 606
Evidence in the Court of Appeal 608
Evidence in the House of Lords 615

APPENDIX OF STATUTES AND ORDERS 616–649
INDEX . . . . . [1]–[62]

TABLE OF CASES.

A.

PAGE

Abbey *v.* Lill, 5 Bing. 299; 2 M. & P. 534 . . . . 43, 338
Abbot *v.* Plumbe, 1 Doug. 216; Cockle, L. C. 331 . . . 239
Abbott *v.* Bates, 33 L. T. 491; 24 W. R. 101 483
——— *v.* Morice, 3 Ves. 148 496
Abley *v.* Dale, 11 C. B. 390 504
Abouloff *v.* Oppenheimer, 10 Q. B. D. 295; 52 L. J. Q. B. 1; 47 L. T. 325; 31 W. R. 57 . . . . . 392, 400
Abrahams *v.* Dunlop, [1905] 1 K. B. 46 606
Abrath *v.* North Eastern Rail. Co., 11 App. Cas. 247; 55 L. J. Q. B. 457; 55 L. T. 63; 15 Cox, C. C. 354 138
Abrey *v.* Crux, L. R. 5 C. P. 37; 39 L. J. C. P. 9; 21 L. T. 327 . 167
Acerro *v.* Petroni, 1 Stark. 100 460
Adam *v.* Kerr, 1 Bos. & P. 360 . . . . . 241, 339
——— S.S. Co. *v.* London Assurance Corp., [1914] 3 K. B. 1256 . 556
Adams *v.* Fisher, 110 L. T. 537 545
——— *v.* Kelly, Ry. & Moo. 157 311
——— *v.* Peters, 2 Car. & K. 723 42
Adamson, *Ex parte*, *In re* Collie, 8 Ch. D. 807 . . . 388, 406
Admiralty Commissioners *v.* Aberdeen Steam Trawling Co., [1909] S. C. 335 . . . . . 233, 379
Ainsworth *v.* Wilding, [1900] 2 Ch. 315 555
Airey, *In re*, [1897] 1 Ch. 164; 66 L. J. Ch. 152; 76 L. T. 151; 45 W. R. 286 340
——— *v.* Hall, 2 De G. & S. 489 559
Alabaster *v.* Harness, 70 L. T. 375 541
Alban *v.* Pritchett, 6 T. R, 680. 381
Albert *v.* Grosvenor Investment Co., L. R. 3 Q. B. 123; 37 L. J. Q. B. 24; 8 B. & S. 664 168
Aldersey, *In re*, [1905] 2 Ch. 186 355
Alderson *v.* Langdale, 3 B. & Ad. 660 490
Alexander *v.* North Eastern Rail. Co., 6 B. & S. 340 . . . 604
Algoma Central Rail. Co. *v.* R., [1903] A. C. 478 502
Alina, The, 5 Ex. D. 227 504
Alison *v.* Alison, 50 L. J. Ch. 574; 29 W. R. 732 542
Alivon *v.* Furnival, 1 C. M. & R. 277; 3 L. J. Ex. 241; 4 Tyr. 751 311
Allan *v.* Morrison, [1900] A. C. 604; 69 L. J. P. C. 141 . . 340
Allcard *v.* Skinner, 36 Ch. D. 145; 36 W. R. 251 . . 144, 350
Allen *v.* Allen, [1894] P. 248; 63 L. J. P. 120; 70 L. T. 783; 42 W. R. 549 199
——— *v.* Dundas, 3 T. R. 125; 1 R. R. 666 223
——— *v.* Maddock, 11 Moo. P. C. 454 498
——— *v.* Yoxall, 1 Car. & K. 315 581
Allhusen *v.* Labouchere, 3 Q. B. D. 654 . . . . 538, 541

PAGE
Alliott *v.* Smith, [1895] 2 Ch. 111 544
Alner *v.* George, 1 Camp. 392 376
Alston, In the Goods of, [1892] P. 142; 66 L. T. 591 . . . 357
Amos *v.* Hughes, 1 M. & Rob. 464; Cockle, L. C. 125 . . 135, 136
Anderson, *In re*, [1905] 2 Ch. 70 414
——— *v.* Bank of British Columbia, 2 Ch. D. 644 . . 208, 250
——— *v.* Collinson, [1901] 2 K. B. 107; 70 L. J. K. B. 620; 49 W. R. 623 399
——— *v.* Hamilton, 2 Brod. & B. 156 n.; 8 Price, 244; 4 Moore, (C. P.) 593 n. 210
——— *v.* Weston, 6 Bing. N. C. 296; Cockle, L. C. 332 . 243, 337
Andrew *v.* Motley, 12 C. B. (N.S.) 526; 32 L. J. C. P. 128 . 246, 339
Anglesea (Marquis of) *v.* Hatherton (Lord), 10 M. & W. 218; 12 L. J. Ex. 57 58
Angus *v.* Dalton, 6 App. Cas. 740; 50 L. J. Q. B. 689; 44 L. T. 844; 30 W. R. 191 . . . . . 346, 348
Ankerson *v.* Conelly, [1907] 1 Ch. 678 536
Annesley *v.* Anglesea (Lord), 17 How. St. Tr. 1430 . . . 468
Anon., 1 Vern. 60 199
———, Ambler, 252 153
———, cited in 3 T. R. 752–754 153
———, 1 Leach, C. C. 430 n. 187
Anstee *v.* Nelms, 1 H. & N. 225; 26 L. J. Ex. 5; 27 L. T. 190; 4 W. R. 612 497
Anstey *v.* North and South Woolwich Subway Co., 11 Ch. D. 439 . 546
Anthony *v.* Anthony, 35 T. L. R. 559 235
——— *v.* Halstead, 37 L. T. 433 615
Appleton *v.* Braybrook, 6 M. & S. 34; 2 Stark. 6 222
———, French and Scrafton, Ltd., *In re*, [1905] 1 Ch. 749 . 576
Armory *v.* Delamirie, 1 Stra. 505; 1 Sm. L. C. 153, 396 . . 329, 354, 355, 427
Armour *v.* Bate, [1891] 2 Q. B. 233; 60 L. J. Q. B. 433; 39 W. R. 546...597
——— *v.* Walker, 25 Ch. D. 673; 53 L. J. Ch. 413; 32 W. R. 214...586, 587
Armstrong *v.* Armstrong, [1892] P. 98; 61 L. J. P. 63; 66 L. T. 384...586
Arnold *v.* Bottomley, [1908] 2 K. B. 151 551
——— *v.* Poole (Mayor of), 4 Man. & G. 860; 12 L. J. C. P. 97; 7 Jur. 653; 2 Dowl. (N.S.) 574 155
Arnott, *Re*, 5 Morrell, 286; 60 L. T. 109; 37 W. R. 223 . . 203
——— *v.* Hayes, 36 Ch. D. 731; 56 L. J. Ch. 844; 57 L. T. 299; 36 W. R. 246. 321
Ash, Sons & Co., Ltd. (Claudius) *v.* Invicta Manufacturing Co., 29 R. P. C. 465 44
Ashforth *v.* Redford, L. R. 9 C. P. 20; 43 L. J. C. P. 57 . . 482
Ashling *v.* Boon, [1891] 1 Ch. 568; 60 L. J. Ch. 306; 64 L. T. 193; 39 W. R. 298 258
Ashworth *v.* Roberts, 45 Ch. D. 623 540
Asiatic Petroleum Co., Ltd. *v.* Anglo-Persian Oil Co., Ltd., [1916] 1 K. B. 822 234
Assheton-Smith *v.* Owen, [1906] 1 Ch. 179 296
Asylum for Idiots *v.* Handysides, 22 T. L. R. 573 321
Atherton, *In re*, [1912] 2 K. B. 251 197
Atkinson *v.* Morris, [1897] P. 40; 66 L. J. P. 17; 75 L. T. 440; 45 W. R. 293 . . . . . 310, 496
Att.-Gen. *v.* Antrobus, [1905] 2 Ch. 188 . . . 233, 297, 344
——— *v.* Birmingham Drainage Board, [1912] A. C. 788 . . 611
——— *v.* Cross, 3 Mer. 524 43
——— *v.* Davison, M'Clel. & Y. 160 89
——— *v.* Emerson, 10 Q. B. D. 191; 52 L. J. Q. B. 67; 48 L. T. 18; 31 W. R. 191 562

PAGE
Att.-Gen. *v.* Ewelme Hospital, 17 Beav. 366; 22 L. J. Ch. 846 . 345
——— *v.* Gaskill, 20 Ch. D. 519 539
——— *v.* Hitchcock, 1 Ex. 91; 16 L. J. Ex. 259; Cockle, L. C. 283 . . . . . 468, 469
——— *v.* Horner, 14 Q. B. D. 245; 11 App. Cas. 66 . . 509
——— *v.* London (Corporation of), 2 Mac. & G. 247; 19 L. J. Ch. 314; 14 Jur. 205 538
——— *v.* Newcastle-upon-Tyne Corporation, [1897] 2 Q. B. 384; 66 L. J. Q. B. 593 546
——— *v.* ———————————, [1899] 2 Q. B. 478 555
——— *v.* North Metropolitan Tramways Co., [1892] 3 Ch. 70 . 550
——— *v.* Nottingham Corporation, [1904] 1 Ch. 673 . 41, 42
——— *v.* Radloff, 10 Ex. 84; 23 L. J. Ex. 240; 10 Jur. 555; 2 C. L. R. 1116 181
——— *v.* Scott, 20 T. L. R. 633 536
——— *v.* Stephens, 1 K. & J. 724; 6 De G. M. & G. 141; 25 L. J. Ch. 888 406
——— *v.* West Gloucestershire Water Co., [1909] 2 Ch. 338 . 510
——— *v.* Whitwood Local Board, 40 L. J. Ch. 592; 19 W. R. 1107 564
——— *v.* Winans, 85 L. T. 508; [1904] A. C. 287; 73 L. J. K. B. 613 358
Att.-Gen. of Trinidad *v.* Eriché, [1893] A. C. 523; 63 L. J. P. C. 6; 69 L. T. 505 392
Audley's Case (Lord), 3 How. St. Tr. 402 183
Auerbach *v.* Nelson, [1919] 2 Ch. 383 160
Auriol *v.* Smith, 18 Ves. 198 . . . . . 48, 239
Australian Newspaper Co., Ltd. *v.* Bennett, [1894] A. C. 284 . 611
Australian Steam Navigation Co. *v.* Smith, 14 App. Cas. 318 . 606
Aveson *v.* Kinnaird (Lord), 6 East, 188; 2 Smith, 286; 8 R. R. 455; Cockle, L. C. 69 . . . . . 41, 69, 305, 306
Aylesford Peerage Case, The, 11 App. Cas. 1 . . 65, 124, 175, 343

B.

Bacon, *Ex parte*, 17 Ch. D. 447; 29 W. R. 574 393
Badar Bee *v.* Habib Merican Noordin, [1909] A. C. 615 . . 392
Badeley *v.* Consolidated Bank, 38 Ch. D. 238 488
Badische Anilin, etc. *v.* Levinstein, 4 R. P. C. 470 . . . 131
Baerlein *v.* Chartered Mercantile Bank, [1895] 2 Ch. 488; 65 L. J. Ch. 54; 43 W. R. 692 . . . . . 26, 27, 323, 629
Bahia, etc., Rail. Co., *In re*, L. R. 3 Q. B. 584; 37 L. J. Q. B. 176; 9 B. & S. 844; 18 L. T. 467; 16 W. R. 826 . . . 414, 415
Bain *v.* Whitehaven Rail. Co., 3 H. L. Cas. 1 26
Bake *v.* French, [1907] 1 Ch. 428 396
Baker *v.* Wadsworth, 67 L. J. Q. B. 301 612
Baldney *v.* Ritchie, 1 Stark. 338 591
Balfour *v.* Tillett, [1913] W. N. 70 560
Balkis Consolidated Co. *v.* Tomkinson, [1893] A. C. 396; 63 L. J. Q. B. 134; 69 L. T. 598; 42 W. R. 284; 1 R. 178 . 414, 415
Balls *v.* Westwood, 2 Camp. 12 409
Banbury *v.* Banbury, 2 Beav. 177 251
Banbury Peerage Case, 1 S. & S. 155 . . . . . 146, 175
Bank of Hindustan *v.* Alison, L. R. 6 C. P. 222; 40 L. J. C. P. 117; 19 W. R. 505 414
——— Louisiana *v.* Bank of New Orleans, 43 L. J. Ch. 269 . 408
Banks *v.* Cartwright, 15 W. R. 417 278
——— *v.* Goodfellow, L. R. 5 Q. B. 549 186

PAGE
Banque Franco-Egyptienne *v.* Lütscher, 28 W. R. 133 . . 585
Barbat *v.* Allen, 7 Ex. 609; 21 L. J. Ex. 156 181
Barber *v.* Deutsche Bank, [1919] A. C. 304 614
——— *v.* Wood, 2 M. & R. 172 579
Barham *v.* Lord Huntingfield, [1913] 2 K. B. 193 . . . 540
Barlow *v.* Ross, 24 Q. B. D. 381 504
Barnes, *Ex parte*, 16 Q. B. D. 522 137
———, *Ex parte*, [1896] A. C. 146; 65 L. J. Ch. 394; 74 L. T. 153; 44 W. R. 433; 3 Manson, 63 576
——— *v.* Merritt, 15 T. L. R. 419 114
Barnett *v.* Allen, 3 H. & N. 376 . . . . . 476, 604
Barr's Trusts, *In re*, 4 K. & J. 236 441
Barraclough *v.* Greenhough, L. R. 2 Q. B. 1, 612; 36 L. J. Q. B. 26, 251; 7 B. & S. 170; 8 B. & S. 623 . . 224, 594
——— *v.* Johnson, 8 A. & E. 99; 3 N. & P. 233; 2 Jur. 839 298
Barrow *v.* Dyster, 13 Q. B. D. 635; 51 L. T. 573; 33 W. R. 199 . 483
Barry *v.* Barclay, 15 C. B. (N.S.) 849 584
——— *v.* Butlin, 2 Moore, P. C. 480 145
Bartholomew *v.* Menzies, *In re* Weston, [1902] 1 Ch. 680; 71 L. J. Ch. 343; 86 L. T. 551; 50 W. R. 294 . 455
——— *v.* Stephens, 8 C. & P. 728 595
Bartlett *v.* Smith, 11 M. & W. 483; Cockle, L. C. 10 . . 273, 601
Barton *v.* Dawes, 10 C. B. 261; 19 L. J. C. P. 302 . . . 160
——— *v.* Muir, L. R. 6 P. C. 134 . . . . . 503, 509
Bassford *v.* Blakesley, 6 Beav. 131 554
Bateman *v.* Faber, [1898] 1 Ch. 144 404
——— *v.* Hunt, [1904] 2 K. B. 530 . . . . . 402, 403
Baten's Case, 9 Rep. 53, a 130
Bater *v.* Bater [1906] P. 209 401
Batten Pooll *v.* Kennedy, [1907] 1 Ch. 256 410
Baudains *v.* Liquidators of Jersey Banking Co., 13 App. Cas. 832 609
Bauerman *v.* Radenius, 7 T. R. 663 382
Baugh *v.* Cradocke, 1 M. & Rob. 182 205
Bayley *v.* Cass, 10 W. R. 370 565
Beale *v.* Kyte, [1907] 1 Ch. 564 164
Beamish, *In re*, 9 W. R. 475 356
——— *v.* Whitney, [1909] 1 Ir. R. 360 154
Beatson *v.* Skene, 5 H. & N. 838; 29 L. J. Ex. 430 . . 234, 561
Beatty *v.* Cullingworth, 60 J. P. 740 77
Beaufort (Duke of) *v.* Crawshay, L. R. 1 C. P. 699; 35 L. J. C. P. 342; 1 H. & N. 638 290
——— *v.* Smith, 4 Ex. 450; 19 L. J. Ex. 97 . 213, 298
Beavan *v.* M'Donnell, 10 Ex. 184; 23 L. J. Ex. 326 . . 33, 115
Beckett *v.* Ramsdale, *In re* Hodgson, 31 Ch. D. 177 . . . 454
Bedle *v.* Beard, 12 Rep. 5 346
Belbin *v.* Skeats, 1 Sw. & Tr. 148; 27 L. J. P. M. & A. 56 . 241, 242
Bell *v.* Parke, 11 Ir. C. L. R. 413 123
Bellerophon, The, 44 L. J. Adm. 5; 31 L. T. 756; 23 W. R. 248 . 235
Belmore *v.* Kent County Council, [1901] 1 Ch. 873; 70 L. J. Ch. 501; 84 L. T. 523; 49 W. R. 459; 65 J. P. 456 . . . 359
Belt *v.* Lawes (1882), Times Newspaper, Dec. 12th and 16th . 43
Bender *v.* Zent, [1909] 2 K. B. 41; 78 L. J. K. B. 533; 100 L. T. 639 . . . . . 146, 361
Benjamin, *In re*, [1902] 1 Ch. 723; 71 L. J. Ch. 319; 86 L. T. 387 355, 356
Bennet and Wife *v.* Watson and Another, 3 M. & S. 1 . . 514
Bentinck *v.* London Joint Stock Bank, [1893] 2 Ch. 120; 62 L. J. Ch. 358; 68 L. T. 315; 42 W. R. 140 417
Berdan *v.* Greenwood, 20 Ch. D. 764 n. 583, 585

PAGE
Beresford *v.* Att.-Gen., [1918] P. 33 . . . . . 284, 535
Berkeley Peerage Case, 4 Camp. 401; 14 R. R. 782; Cockle, L. C. 202 . . . . . 264, 294, 300, 303, 304
Berryman *v.* Wise, 4 T. R. 366; Cockle, L. C. 31 336
Bessela *v.* Stern, 2 C. P. D. 265; 46 L. J. C. P. 467; 37 L. T. 88; 25 W. R. 561 . . . . . 84, 372, 448
Betts *v.* Willmott, L. R. 6 Ch. 239; 14 W. R. 369 137
Bevan *v.* Webb, [1901] 2 Ch. 59 563
Bewicke *v.* Graham, 7 Q. B. D. 400 555
Bewley *v.* Atkinson, 13 Ch. D. 283; 49 L. J. Ch. 6; 41 L. T. 603; 28 W. R. 638 271
Bicknell *v.* Bicknell, [1908] W. N. 97 585
Bidder *v.* Bridges, 54 L. T. 529; 34 W. R. 514 . . 244, 245, 297
——— *v.* ———, 26 Ch. D. 1 . . . . . 583, 584
Biddle *v.* Bond, 6 B. & S. 225; 34 L. J. Q. B. 137; 12 L. T. 178; 13 W. R. 561; 11 Jur. (N.S.) 425 410
Birch *v.* Mather, 22 Ch. D. 629 540
——— *v.* Ridgway, 1 F. & F. 270 47
Birchall *v.* Birch, Crisp & Co., [1913] 2 Ch. 375 550
——— *v.* Bullough, [1896] 1 Q. B. 325; 66 L. J. Q. B. 252; 74 L. T. 27; 44 W. R. 300 . . . . 151, 152, 257, 462
Bird *v.* Harris, 29 W. R. 45; 43 L. T. 434 455
—— *v.* Keep, [1918] 2 K. B. 692 57
Birmingham, etc., Omnibus Co. *v.* L. & N. W. Rail. Co., [1913] 3 K. B. 850 556
——— S. A. Co. *v.* Webb, 24 R. P. C. 27 . . . . 44, 435
Birt *v.* Barlow, 1 Doug. 171 . . . . . 226, 227
Bishop *v.* Balkis Consolidated Co., 25 Q. B. D. 512; 59 L. J. Q. B. 565; 39 W. R. 99 416
——— *v.* Holt, [1900] 2 Ch. 620; 69 L. J. Ch. 753; 83 L. T. 297; 49 W. R. 88 495
Blackburn Guardians *v.* Brooks, 7 Ch. D. 68 608
Blackett *v.* Royal Exchange Assurance Co., 2 C. & J. 244; 2 Tyr. 266 . . . . . 481, 483
Blair *v.* Bromley, 11 Jur. 617 257
—— *v.* Haycock, 34 T. L. R. 39 542
Blake *v.* Albion Life Assurance Society, 4 C. P. D. 94 . . . 114
Blanchet *v.* Llantivit Colliery Co., L. R. 9 Ex. 77; 43 L. J. Ex. 50; 22 W. R. 290 360
Blandy-Jenkins *v.* Earl of Dunraven, [1899] 2 Ch. 121 . . 247
Blewitt *v.* Tritton, [1892] 2 Q. B. 327; 61 L. J. Q. B. 773; 67 L. T. 72; 41 W. R. 36 259
Bloomenthal *v.* Ford, [1897] A. C. 156; 76 L. T. 205; 45 W. R. 449; 4 Manson, 156 . . . . . 414, 415
Blundell *v.* Gladstone, 11 Sim. 486 488
Board of Trade, The, *Ex parte, In re* Brünner, 19 Q. B. D. 572 . 91
——— ———, The *v.* The Sailing Ship Glenpark, Ltd., [1904] 1 K. B. 682 332
Boddy *v.* Boddy, 30 L. J. P. M. & A. 23 106
Boileau *v.* Rutlin, 2 Ex. 665 391
Bolckow, Vaughan & Co. *v.* Fisher, 10 Q. B. D. 161; 52 L. J. Q. B. 12; 31 W. R. 235 . . . . . 367, 544
Boldron *v.* Widdows, 1 C. & P. 65 57
Bolton *v.* Liverpool (Corporation of), 1 Myl. & K. 94; 1 L. J. Ch. 166 202
Bond *v.* Barrow Hæmatite Steel Co., [1902] 1 Ch. 353 . . 42
Bonelli, In the Goods of, 1 P. D. 69; 45 L. J. P. D. & A. 42; 34 L. T. 32; 24 W. R. 255 49
Bonnardet *v.* Taylor, 1 J. & H. 386 564

PAGE
Bootle *v.* Blundell, 19 Ves. 494; 13 R. R. 254 241
Bosvile *v.* Att.-Gen., 12 P. D. 177; 56 L. J. P. 97; 57 L. T. 88; 36 W. R. 79 344
Bottomley, *Ex parte*, [1909] 2 K. B. 14 282
——— *v.* Forbes, 5 Bing. N. C. 121; 6 Scott, 816; 1 Arn. 481; 2 Jur. 1016 482
Bourne *v.* Swan, [1903] 1 Ch. 211 327
Bovill *v.* Cowan, L. R. 5 Ch. 495; 18 W. R. 533. 559
Bowden *v.* Henderson, 2 Sm. & G. 360 356
Bowes *v.* Foster, 2 H. & N. 779; 26 L. J. Ex. 262 376
Bowman *v.* Hodgson, L. R. 1 P. & D. 362; 36 L. J. P. 124; 16 L. T. 392 242
——— *v.* Nicholl, 5 T. R. 537; 1 Esp. 81 259
——— *v.* Taylor, 2 A. & E. 278; 4 N. & M. 264; Cockle, L. C. 48 402
Boyd *v.* Bolton, Ir. R. 8 Eq. 113 372
—— *v.* Petrie, L. R. 3 Ch. 818 564
Boydell *v.* Jones, 4 M. & W. 446 477
Boyle *v.* Wiseman, 10 Ex. 647 . . . . . 194, 601
—— *v.* ———, 11 Ex. 360; 24 L. J. Ex. 284 592
Bradfield *v.* Tupper, 7 Ex. 27 377
Bradlaugh *v.* De Rin, L. R. 3 C. P. 286; 37 L. J. C. P. 146; 16 W. R. 1128 340
Bradley *v.* Arthur, 4 B. & C. 295 43
Bradshaw *v.* Widdrington, [1902] 2 Ch. 430; 71 L. J. Ch. 627; 86 L. T. 726; 50 W. R. 561 615
Braid *v.* Braid, 25 T. L. R. 646 228
Brain *v.* Preece, 11 M. & W. 773 . . . . . 277, 313
Bramwell *v.* Lucas, 2 B. & C. 745; 4 Dowl. & R. 367 . . . 206
Brandao *v.* Barnett, 3 C. B. 519 132
Branford *v.* Branford, 4 P. D. 72 556
Bray *v.* Ford, [1896] A. C. 44; 65 L. J. Q. B. 213; 73 L. T. 609 . 615
Breadalbane Case, The, Campbell *v.* Campbell, L. R. 1 H. L. Sc. 182 . . . . . 342, 444
Bremner *v.* Hull, Har. & Ruth. 800 274
Brierley *v.* Brierley, [1918] P. 257 226
Bright *v.* Legerton, 2 De G. F. & J. 606; 30 L. J. Ch. 338; 8 W. R. 678 277
Brindley *v.* Woodhouse, 1 Car. & K. 647 309
Brine *v.* Bazalgette, 3 Ex. 692; 18 L. J. Ex. 348 122
Brisco *v.* Lomax, 8 A. & E. 198; 2 Jur. 682; 3 N. & P. 308 . 298
Bristol (Mayor of) *v.* Cox, 26 Ch. D. 678; 53 L. J. Ch. 1144; 50 L. T. 719; 33 W. R. 255 251
——— Corporation *v.* Sinnott, [1918] 1 Ch. 62 405
Bristow *v.* Secqueville, 5 Ex. 275; 19 L. J. Ex. 289; 3 Car. & K. 64; 14 Jur. 674; Cockle, L. C. 119 . . . . . 40, 49
British Association *v.* Nettlefold, [1912] A. C. 709 . . . 562
Brittain *v.* Kinnaird, 1 Brod. & B. 432 397
Brittridge's Case, 4 Rep. 19 93
Broad *v.* Pitt, M. & M. 233; 3 C. & P. 518 208
Brocklebank *v.* Thompson, [1903] 2 Ch. 344 . . . . 150, 293
Brook *v.* Hook, L. R. 6 Ex. 89; 40 L. J. Ex. 50; L. T. 34; 19 W. R. 508 412
Brookes *v.* Tichborne, 5 Ex. 929 47
Brooks *v.* Steele and Currie, 14 R. P. C. 73 44
Broomfield *v.* Williams, [1897] 1 Ch. 602; 66 L. J. Ch. 305; 76 L. T. 243 146
Brown *v.* Brown, L. R. 3 P. & D. 198 199
——— *v.* Foster, 1 H. & N. 736; 26 L. J. Ex. 249; 3 Jur. (N.S.) 245 206

PAGE
Brown *v.* Hawkes, [1891] 2 Q. B. 718; 65 L. T. 108; 55 J. P. 825 605
—— *v.* Watkins, 16 Q. B. D. 125; 55 L. J. Q. B. 126; 53 L. T. 726; 34 W. R. 293 551
—— *v.* White, 24 W. R. 456 . . . . . 89, 280
—— *v.* Woodman, 6 C. & P. 206 309
—— *v.* Wren Brothers, [1895] 1 Q. B. 390; 64 L. J. Q. B. 119; 72 L. T. 109; 43 W. R. 351 383
Browne *v.* Byrne, 3 E. & B. 703 166
—— *v.* Dunn, 6 The Reports, 67 469
Browning *v.* Browning, [1919] W. N. 28 227
Bruce *v.* Garden, 17 W. R. 990 374
—— *v.* Nicolopulo, 11 Ex. 129 . . . . . 316, 330
—— *v.* ——, 3 W. R. 483 . . . . . 53, 64
Bruner *v.* Moore, [1904] 1 Ch. 305 478
Brunner, *In re, Ex parte* The Board of Trade, 19 Q. B. D. 572; 56 L. J. Q. B. 606; 57 L. T. 418; 35 W. R. 719; 4 Morrell, 255 91
Brunsden *v.* Humphrey, 14 Q. B. D. 141 396
Brunton's Case, L. R. 19 Eq. 302; 23 W. R. 286 416
Bryan *v.* Wagstaff, Ry. & M. 327; 5 B. & C. 314; 2 C. & P. 126 . 593
Buccleuch (Duke of) *v.* Metropolitan Board of Works, L. R. 5 H. L. 418; 41 L. J. Ex. 137; 27 L. T. 1 90
Buckle *v.* Knoop, L. R. 2 Ex. 125, 333; 36 L. J. Ex. 49, 223; 16 L. T. 571; 15 W. R. 999 481
Budden *v.* Wilkinson, [1893] 2 Q. B. 432 555
Bullen *v.* Swan Electric Engraving Co., 23 T. L. R. 258 . . . 138
Bulley *v.* Bulley, L. R. 9 Ch. 739; 44 L. J. Ch. 79; 30 L. T. 848; 22 W. R. 779 404
Bullivant *v.* Att.-Gen. for Victoria, [1901] A. C. 196; 70 L. J. K. B. 645; 84 L. T. 737; 50 W. R. 8 . . . . . 203, 207, 556
Bullock *v.* Corry, 3 Q. B. D. 356; 47 L. J. Q. B. 352; 38 L. T. 102; 26 W. R. 330 . . . . . 203, 292, 556
Burbury *v.* Jackson, [1917] 1 K. B. 16 450
Burchard *v.* Macfarlane, [1891] 2 Q. B. 241; 60 L. J. Q. B. 537; 65 L. T. 282; 39 W. R. 614; 7 Asp. M. C. 93 589
Burchell *v.* Clark, 2 C. P. D. 88 499
Burchfield *v.* Moore, 3 E. & B. 683; 2 C. L. R. 1308; 22 L. J. Q. B. 261; 18 Jur. 727 490
Burges *v.* Wickham, 3 B. & S. 669 166
Burgess *v.* Bennett, 20 W. R. 720 153
Burkinshaw *v.* Nicolls, 3 App. Cas. 1004; 48 L. J. Ch. 179; 26 W. R. 819 414
Burling *v.* Pattison, 9 C. & P. 579 243
Burnaby *v.* Baillie, 42 Ch. D. 282; 58 L. J. Ch. 842; 61 L. T. 634; 38 W. R. 125 . . . . . 174, 218
Burrough *v.* Martin, 2 Camp. 112; Cockle, L. C. 268 . . . 152, 153
Bursill *v.* Tanner, 16 Q. B. D. 1; 55 L. J. Q. B. 53; 53 L. T. 445; 34 W. R. 35 . . . . . 203, 557
Burton *v.* Nicholson, [1909] 1 K. B. 397 507
—— *v.* North Staffordshire Rail. Co., 35 W. R. 536 . . . 535
—— *v.* Plummer, 2 A. & E. 341; 4 N. & M. 315 154
Burvill *v.* Vickers, Ltd., [1916] 1 K. B. 180 614
Bury *v.* Bury, 35 T. L. R. 220 228
Bute (Marquess of) *v.* James, 33 Ch. D. 157; 55 L. J. Ch. 658 . 535
Butler *v.* Butler, [1894] P. 25; 63 L. J. P. 1; 69 L. T. 545; 42 W. R. 49 395
—— *v.* Mountgarrett, 7 H. L. Cas. 633; Cockle, L. C. 206 . 304
Butterley Co., Ltd. *v.* New Hucknall Colliery Co., Ltd., [1910] A. C. 381; 26 T. L. R. 415 501

PAGE

Buxton *v.* Cornish, 12 M. & W. 426; 1 Dowl. & L. 585; 13 L. J. Ex. 91 255
Bynoe *v.* Bank of England, [1902] 1 K. B. 470; 71 L. J. K. B. 208; 86 L. T. 140; 50 W. R. 359 342
Byrne *v.* Boadle, 2 H. & C. 722 147
——— *v.* Harvey, 2 M. & Rob. 89 593
Byrom *v.* Thompson, 11 A. & E. 31; 3 Jur. 1121 . . . 258

C.

Cadge, In the Goods of, L. R. 1 P. & D. 543; 37 L. J. P. & M. 15; 17 L. T. 484; 16 W. R. 406 341
Calcraft *v.* Guest, [1898] 1 Q. B. 759; 67 L. J. Q. B. 505; 78 L. T. 283; 46 W. R. 420 . . . . . 203, 316, 55
Calder *v.* Dobell, L. R. 6 C. P. 486; 40 L. J. C. P. 224; 25 L. T. 129; 19 W. R. 409, 978 161
Caledonian Rail. Co. *v.* North British Rail. Co., 6 App. Cas. 114 . 504
Calley *v.* Richards, 19 Beav. 401 204
Camp *v.* Coe, 31 Ch. D. 460; 55 L. J. Ch. 368; 54 L. T. 150; 34 W. R. 319 485
Campbell, *Ex parte*, 15 Q. B. D. 213; 54 L. J. Q. B. 382; 53 L. T. 208 222
——— *v.* Att.-Gen., L. R. 2 Ch. 571; 36 L. J. Ch. 600; 15 W. R. 915 589
——— *v.* Campbell, The Breadalbane Case, L. R. 1 H. L. Sc. 182 . . . . . 342, 444
——— *v.* Rickards, 5 B. & Ad. 840; 2 N. & M. 542 . . . 38
Canada, Imperial Bank of *v.* Bank of Hamilton, [1903] A. C. 49 . 412
Cannan *v.* Earl of Abingdon, [1900] 2 Q. B. 66 507
Canterbury Corporation *v.* Cooper, 99 L. T. 612 410
Cape Copper Co. *v.* Comptoir d'Escompte de Paris, 38 W. R. 763 . 585
Capital and Counties Bank *v.* Henty, 7 App. Cas. 741; 52 L. J. Q. B. 232; 31 W. R. 157 604
Cardiff, The, [1909] P. 183 467
Cargo ex "Argos," L. R. 5 P. C. 134 . . . . . 504, 505
Carmarthen and Cardigan Rail. Co. *v.* Manchester and Milford Rail. Co., L. R. 8 C. P. 685; 42 L. J. C. P. 262 . . . 57
Carpenter *v.* Buller, 8 M. & W. 212; 10 L. J. Ex. 393 . . . 403
Carr *v.* London and North Western Rail. Co., L. R. 10 C. P. 307; 44 L. J. C. P. 109; 31 L. T. 785; 23 W. R. 747 . 405, 406, 407
Carruthers *v.* Newen, [1903] 1 Ch. 812; 72 L. J. Ch. 356; 88 L. T. 264; 51 W. R. 297 369
Carter *v.* Boehm, 3 Burr. 1905; 1 W. Bl. 593; 1 Sm. L. C. 556; Cockle, L. C. 117 . . . . . 38, 42
——— *v.* Carter, 3 K. & J. 617; 4 Jur (N.S.) 63 402
——— *v.* Ely (Dean of), 7 Sim. 211 163
——— *v.* Pryke, Peake, 95 57
Cartwright *v.* Cartwright, 26 W. R. 684 50
——— *v.* Green, 8 Ves. 405 194
Caryll *v.* Daily Mail Publishing Co., Ltd., 90 L. T. 307 . . 545
Casson *v.* Dale, 1 Bro. Ch. 99 242
Castrique *v.* Imrie, L. R. 4 H. L. 414; 39 L. J. C. P. 350; 23 L. T. 48; 19 W. R. 1 . . . . . 54, 389, 390, 397, 400
Cates *v.* Hardacre, 3 Taunt. 424 195
Catt *v.* Tourle, 19 W. R. 56 251
Cattell *v.* Ireson, E. B. & E. 91; 27 L. J. M. C. 167; 1 Jur. (N.S.) 560 181
Central News Co. *v.* Eastern News Telegraph Co., 53 L. J. Q. B. 236 566
Chadwick *v.* Bowman, 16 Q. B. D. 561; 54 L. T. 16 . . 556, 557

PAGE
Challis's Case, L. R. 6 Ch. 266; 40 L. J. Ch. 431; 19 W. R. 453 375, 414
Chambers *v.* Bernasconi, 1 C. M. & R. 347; 4 Tyr. 531; 3 L. J. Ex. 373; Cockle, L. C. 194 . . . . . 273, 276
Chandler *v.* Grieves, 2 H. Bl. 606 n.; 6 T. R. 325 n. 131
——— *v.* Horne, 2 M. & Rob. 423 456
Chant *v.* Brown, 7 Hare, 79 203
Chaplin *v.* Levy, 9 Ex. 531; 23 L. J. Ex. 117; 2 C. L. R. 556 . 370
Chapman *v.* Smethurst, [1909] 1 K. B. 927 160
——— *v.* Walton, 10 Bing. 57 42
Chappell, In the Goods of, [1894] P. 98; 63 L. J. P. 98; 70 L. T. 245; 6 R. 576 497
——— *v.* Bray, 6 H. & N. 145 384
Chapronière *v.* Mason, 21 T. L. R. 633 . . . . . 138, 147
Charlton *v.* Coombes, 4 Giff. 372; 32 L. J. Ch. 284; 8 L. T. 81; 11 W. R. 504; 9 Jur. 534. 207
Charnock *v.* Merchant, [1900] 1 Q. B. 474; 69 L. J. Q. B. 221; 82 L. T. 89; 48 W. R. 339; 64 J. P. 183 177
Charter *v.* Charter, L. R. 7 H. L. 364; L. R. 2 P. & D. 315; 41 L. J. P. 10; 20 W. R. 212 . . . . . 493, 497
Chatenay *v.* Brazilian Telegraph Co., [1891] 1 Q. B. 79; 60 L. J. Q. B. 295; 63 L. T. 739; 39 W. R. 65 479
Chatterton *v.* Secretary of State for India, [1895] 2 Q. B. 195; 64 L. J. Q. B. 676; 72 L. T. 858; 59 J. P. 596 235
Chesterfield (Lord) *v.* Harris, [1908] 2 Ch. 397 348
Chichester *v.* Donegall (Marquis of), L. R. 5 Ch. 497; 39 L. J. Ch. 694; 22 L. T. 458; 18 W. R. 531 554
Chisman *v.* Count, 2 Man. & G. 307 374
Cholmondeley *v.* Clinton, 19 Ves. 268 203
Chorlton *v.* Lings, L. R. 4 C. P. 374 510
Christie *v.* Christie, L. R. 8 Ch. 503; 52 L. J. Ch. 544 . . 541
——— *v.* Griggs, 2 Camp. 79 147
Church *v.* Imperial Gas Light and Coke Co., 6 A. & E. 846; 3 N. & P. 35; 1 W. W. & H. 137 155
——— *v.* Perry, 36 L. T. 513 546
Churton *v.* Frewen, 2 Dr. & Sm. 390; 46 L. J. Ch. 660; 12 L. T. 105; 13 W. R. 490 563
Civil, Naval, and Military Outfitters, *In re*, [1899] 1 Ch. 215; 68 L. J. Ch. 164; 80 L. T. 241; 47 W. R. 233; 5 Manson, 100 . 576
Clarence Hotel, *In re*, 54 Sol. J. 117 45
Clark *v.* Adie, 2 App. Cas. 423; 46 L. J. Ch. 598; 37 L. T. 1; 26 W. R. 45 . . . . . 409, 411
Clark *v.* Clark, 1 M. & Rob. 3 204
——— *v.* Molyneux, 3 Q. B. D. 237; 14 Cox, C. C. 10; 47 L. J. Q. B. 230; 37 L. T. 694; 26 W. R. 104 604
Clarke, In the Goods of, [1896] P. 287; 66 L. J. P. 9 . . . 356
Clarkson *v.* Woodhouse, 3 Doug. 189; 5 T. R. 412 n. 247
Claudius Ash, Sons & Co., Ltd. *v.* Invicta Manufacturing Co., 29 R. P. C. 465 44
Cleave *v.* Jones, 6 Ex. 573 202
——— *v.* ———, 21 L. J. Ex. 105; 7 Ex. 421 251
Clegg *v.* Edmondson, 22 Beav. 125 553
Clementson *v.* Mason, L. R. 10 C. P. 209 508
Clever *v.* Kirkman, 24 W. R. 159 162
Cliff's Trusts, *In re*, [1892] 2 Ch. 229; 66 L. T. 683; 40 W. R. 439 223
Clifford *v.* Parker, 2 Man. & G. 909; 3 Scott, N. R. 233; 10 L. J. C. P. 227 . . . . . 489, 490
——— *v.* Timms, [1907] 2 Ch. 256; [1908] A. C. 12 59
Clinch *v.* Financial Corporation, L. R. 2 Eq. 271; 14 W. R. 685...559, 560

PAGE
Clouston & Co., Ltd. *v.* Corry, [1906] A. C. 122 602
Clunnes *v.* Pezzey, 1 Camp. 8 354
Coates *v.* Bainbridge, 5 Bing. 58; 2 M. & P. 142 . . . 379
Coats *v.* Herefordshire County Council, [1909] 2 K. B. 579 . . 108
Cobbett *v.* Kilminster, 4 F. & F. 490 48
Cobden *v.* Kendrick, 4 T. R. 431 204
Coch *v.* Allcock, 21 Q. B. D. 178; 57 L. J. Q. B. 489; 36 W. R. 747 . . . . . 586, 587
Cocks *v.* Nash, 9 Bing. 721 565
Coghlan *v.* Cumberland, [1898] 1 Ch. 704 611
Cole *v.* Langford, 67 L. J. Q. B. 698 612
—— *v.* Manning, 2 Q. B. D. 611; 46 L. J. M. C. 175; 35 L. T. 941 450
—— *v.* Parkin, 12 East, 471 258
Coles *v.* Coles, L. R. 1 P. & D. 70; 35 L. J. P. & M. 40 239, 241, 242
Colledge *v.* Horn, 3 Bing. 119 370
Collie, *In re*, *Ex parte* Adamson, 8 Ch. D. 807 . . . 388, 406
Collier *v.* Walters, L. R. 17 Eq. 252; 43 L. J. Ch. 216; 22 W. R. 209 397
Colling *v.* Treweek, 6 B. & C. 394 . . . . . 594, 595
Collins *v.* Blantern, 2 Wilson, 341; 1 Sm. L. C. 412 . 167, 386, 403
——— *v.* Carnegie, 1 A. & E. 695; 3 N. & M. 703 . . . 168
——— *v.* L. G. O. Co., 63 L. J. Q. B. 428 250
Collis *v.* Hector, L. R. 19 Eq. 334; 44 L. J. Ch. 267; 23 W. R. 485 401
Colonial Bank *v.* Cady, 15 App. Cas. 267; 63 L. T. 27; 39 W. R. 17 408
Colonial Bank of Australasia *v.* Marshall, [1906] A. C. 559 . . 412
Combe *v.* Corporation of London, 1 Y. & C. C. C. 631 . . . 555
Commissioner for Railways *v.* Brown, 13 App. Cas. 133 . . 610
Compagnie Financière du Pacifique *v.* Peruvian Guano Co., 11 Q. B. D. 55; 52 L. J. Q. B. 185; 30 W. R. 395 . . . 551
Compagnol *v.* Martin, 2 W. Bl. 790 605
Compania Naviera Vasconzada *v.* Churchill & Sim, [1906] 1 K. B. 237 . . . . . 388, 408
Concha *v.* Concha, 11 App. Cas. 541; 56 L. J. Ch. 257; 55 L. T. 522; 35 W. R. 477 . . . . . 389, 390
——— *v.* Murrietta, 40 Ch. D. 543; 60 L. T. 798 50
Connor *v.* Fitzgerald, 11 Ir. L. R. 106 270
Conradi *v.* Conradi, L. R. 1 P. & D. 514 395
Contract Corporation, *In re*, L. R. 13 Eq. 27 585
Cooke *v.* Lamotte, 15 Beav. 234; 21 L. J. Ch. 371 . . 144, 350
—— *v.* Rickman, [1911] 2 K. B. 1125 392
—— *v.* Soltau, 2 S. & S. 154 345
Coolgardie Goldfields, Ltd., *In re*, [1900] 1 Ch. 475 . . . 260
Cooney *v.* Edevain, 14 T. L. R. 34 604
Cooper *v.* Blackmore, 2 T. L. R. 746 545
——— *v.* Bockett, 4 Moo. P. C. 419 341
——— *v.* Gibbons, 3 Camp. 363 355
——— *v.* Kendall, [1909] 1 K. B. 405 156
——— *v.* Lloyd, 6 C. B. (N.S.) 519 184
——— *v.* Ward, 6 C. B. (N.S.) 50 58
Coote *v.* Ford, [1899] 2 Ch. 93; 68 L. J. Ch. 508; 80 L. T. 697; 47 W. R. 489, 548 . . . . . 366, 394
Coppock *v.* Bower, 4 M. & W. 361 257
Cornwall *v.* Richardson, R. & M. 305 122
Corsellis, *In re*, [1906] 2 Ch. 316 . . . . . 484, 492
Costa Rica (Republic of) *v.* Erlanger, L. R. 19 Eq. 33; 44 L. J. Ch. 281 . . . . . 554, 564
——————— *v.* Erlanger, 3 Ch. D. 62 506
Cotton *v.* Vagan & Co., [1896] A. C. 457 509

PAGE
Cotton *v.* Wood, 8 C. B. (N.S.) 568 . . . . . 147, 148
Couchman *v.* Greener, 1 R. P. C. 197 411
Coulson *v.* Disborough, [1894] 2 Q. B. 316; 70 L. T. 617; 42 W. R. 449; 9 R. 390; 58 J. P. 784 466
Coventry *v.* Great Eastern Rail. Co., 11 Q. B. D. 776; 59 L. J. Q. B. 694; 49 L. T. 641 408
Cowling *v.* Ely, 2 Stark. 366; 20 R. R. 694 380
Cox *v.* Allingham, Jac. 514 223
—— *v.* English, etc., Bank, [1905] A. C. 168 . . . 611, 612
—— *v.* Lee, L. R. 4 Ex. 288; 38 L. J. Ex. 221 604
Cozens, *In re*, [1903] 1 Ch. 138 474
Crafter *v.* Metropolitan Rail. Co., L. R. 1 C. P. 300 . . . 43
Crease *v.* Barrett, 1 C. M. & R. 919 . . . . 267, 293, 296
Crisp *v.* Anderson, 1 Stark. 35; 18 R. R. 744 . . . 256, 342
Critchell *v.* London and South Western Rail. Co., [1907] 1 K. B. 860 . . . . . 366, 370
Croft *v.* Croft, 34 L. J. P. M. & A. 44; 4 S. & T. 10; 11 Jur. (N.S.) 183; 11 L. T. 781; 13 W. R. 526 339
Cromack *v.* Heathcote, 2 B. & B. 4; 4 Moore (C. P.) 357 . . 204
Croockewit *v.* Fletcher, 1 H. & N. 893; 26 L. J. Ex. 153 . . 490
Cropper *v.* Smith, 26 Ch. D. 700; 53 L. J. Ch. 891; 51 L. T. 733; 33 W. R. 60; 1 R. P. C. 96 . . . . . 399, 411
Crosbie *v.* Hetherington, 4 M. & G. 933 132
Crosfield & Sons, Ltd., *In re* Joseph, [1910] 1 Ch. 118; (C. A.), *ibid.*, 130 44
———— ———— (Joseph) *v.* Techno-Chemical Laboratories, 29 T. L. R. 378 44
Crouch *v.* Hooper, 16 Beav. 182 428
Crowley, *Ex parte*, 24 L. T. (O.S.) 244 181
Crowther *v.* Solomons, 6 C. B. 758; 18 L. J. C. P. 92 . . . 256
Croxton *v.* May, 9 Ch. D. 388; 39 L. T. 461; 27 W. R. 327 . . 357
Cunningham, *Ex parte*, 13 Q. B. D. 418; 53 L. J. Ch. 1067; 33 W. R. 22 137
Cunninghame *v.* Cunninghame, 2 Dow, 507 343
Curtis *v.* Beaney, [1911] P. 181 555
——— *v.* Curtis, 21 T. L. R. 676 455
Cuthbert *v.* Cumming, 11 Ex. 405; 24 L. J. Ex. 310; 1 Jur. (N.S.) 686 166
Cutter *v.* Powell, 2 Sm. L. C. 1 483

D.

Da Costa *v.* Jones, Cowp. 729 210
Daines and Another *v.* Hartley, 3 Ex. 200 476
Daintrey, *In re*, [1893] 2 Q. B. 116; 62 L. J. Q. B. 511; 69 L. T. 257; 41 W. R. 590; 10 Morrell, 158 . . . . . 253, 254
Dakhyl *v.* Labouchere, [1908] 2 K. B. 325 n. 604
Dalgleish *v.* Lowther, [1899] 2 Q. B. 590 . . . . 540, 543
Dalrymple *v.* Leslie, 8 Q. B. D. 5 541
Dalton *v.* Angus, 6 App. Cas. 740; 50 L. J. Q. B. 689; 44 L. T. 844; 30 W. R. 191; 46 J. P. 132 . . . . 346, 348
——— *v.* Fitzgerald, [1897] 2 Ch. 86; 66 L. J. Ch. 604; 76 L. T. 700; 45 W. R. 685 414
Daniel *v.* Wilkin, 7 Ex. 429; 21 L. J. Ex. 236 296
Darby *v.* Ouseley, 1 H. & N. 1; 25 L. J. Ex. 227; 2 Jur. (N.S.) 497 124, 384, 489
Dare *v.* Heathcote, 25 L. J. Ex. 245 602
Dauncey *v.* Holloway, [1901] 2 K. B. 441 604

PAGE
Davey *v.* Pemberton, 11 C. B. (N.S.) 628 . . . . 312, 563
Davidson *v.* Cooper, 13 M. & W. 343; 13 L. J. Ex. 276 . . 490
Davies, *In re*, [1909] W. N. 212 219
——— *v.* Fitton, 2 D. & War. 225 164
——— *v.* Humphreys, 6 M. & W. 153; 9 L. J. Ex. 263 . . 271
——— *v.* Lowndes, 6 Man. & G. 471; 12 L. J. C. P. 506; 7 Scott, N. R. 214 . . . . . 302, 303
——— *v.* Morgan, 1 C. & J. 587 272
Davis *v.* Davis, [1894] 1 Ch. 393 488
——— *v.* Jones, 17 C. B. 625; 25 L. J. C. P. 91 . . 157, 162, 165
Dawes, *Ex parte*, 17 Q. B. D. 275; 55 L. T. 114; 3 W. R. 752 . 499
Dawkins *v.* Rokeby (Lord), L. R. 8 Q. B. 255; 42 L. J. Q. B. 63; 28 L. T. 134; 21 W. R. 544 . . 234
——— *v.* ———, L. R. 7 H. L. 744 . . . 235, 472
Dawson *v.* Dawson, 22 T. L. R. 52 85
——— *v.* M'Kenzie, [1908] S. C. 648 450
Dean *v.* James, 4 B. & Ad. 546 605
de Bode's Case (Baron), 8 Q. B. 208 . . . . . 50, 270
De Bussche *v.* Alt, 8 Ch. D. 286; 47 L. J. Ch. 381 . . . 373
Deeley's Patent, *In re*, [1895] 1 Ch. 687; 12 R. P. C. 199; [1896] A. C. 496 396
Delamotte *v.* Lane, 9 C. & P. 261 57
De la Rue *v.* Dickinson, 3 K. & J. 388 542
De Lassalle *v.* Guildford [1901] 2 K. B. 215; 70 L. J. K. B. 533; 84 L. T. 549; 49 W. R. 467 . . . . . 157, 164
de la Warr (Earl) *v.* Miles, 17 Ch. D. 535 292
Delay *v.* Alcock, 4 E. & B. 660 . . . . . 255, 256
Delta, The, 1 P. D. 393 393
Den *v.* Fulford, 2 Burr. 1179 214
Dendy *v.* Simpson, 18 C. B. 831; 2 Jur. (N.S.) 642 . . 33, 108
Denn *v.* White, 7 T. R. 112 381
Denton *v.* Donner, 23 Beav. 290 350
De Rosaz, In the Goods of, 2 P. D. 66; 46 L. J. P. & M. 6; 36 L. T. 263; 25 W. R. 352 485
De Rutzen *v.* Farr, 4 A. & E. 53; 5 N & M. 617; 1 H. & N. 735 272
Desborough *v.* Rawlins, 3 Myl. & Cr. 515; 7 L. J. Ch. 171; 2 Jur. 125 . . . . . 205, 206
De Thoren *v.* Att.-Gen., 1 App. Cas. 686 . . . . 338, 343
Devala Mining Co., *In re*, 22 Ch. D. 593; 52 L. J. Ch. 434 . . 379
Dickinson *v.* Coward, 1 B. & Ald. 677 168
——— *v.* Valpy, 10 B. & C. 128; 5 M. & R. 126 . . . 377
Digby *v.* Steadman, 1 Esp. 328 278
Dillon *v.* Balfour, 20 L. R. Ir. 600 606
——— *v.* O'Brien, 16 Cox, C. C. 245 516
Di Sora *v.* Phillipps, 10 H. L. Cas. 624 . . . . 50, 479
Dixon *v.* Hamond, 2 B. & Ald. 310 411
——— *v.* Kennaway, [1900] 1 Ch. 833 414
Dodd *v.* Norris, 3 Camp. 519; 14 R. R. 832 198
Doe *v.* Allen, 12 A. & E. 455; 4 P. & D. 220 495
—— *v.* Barton, 2 M. & R. 28 300
—— *v.* Baytop, 3 A. & E. 188; 2 N. & M. 837; 1 H. & N. 270 . 410
—— *v.* Benson, 4 B. & Ald. 588 478
—— *v.* Calvert, 2 Camp. 389; 11 R. R. 745 224
—— *v.* Catomore, 16 Q. B. 745; 20 L. J. Q. B. 728; Cockle, L. C. 336 341
—— *v.* Coombs, 3 Q. B. 687 256
—— *v.* Coulthred, 7 A. & E. 235 270
—— *v.* Davies, 10 Q. B. 314; 16 L. J. Q. B. 218 . . 294, 301, 303

PAGE

Doe *v.* Derby (Earl of), 1 A. & E. 783 . . . . . 90, 279
—— *v.* Edwards, 5 A. & E. 95 270
—— *v.* Fowler, 19 L. J. Q. B. 151; 14 Q. B. 700 . . . 226
—— *v.* Francis, 2 M. & Rob. 57 410
—— *v.* Griffin, 15 East, 293; 13 R. R. 474; Cockle, L. C. 210 . 302
—— *v.* Hawkins, 2 Q. B. 212; 1 G. & D. 551; 6 Jur. 215; 10 L. J. Q. B. 285 382
—— *v.* Hiscocks, 5 M. & W. 363; 9 L. J. Ex. 27 . 493, 495, 496
—— *v.* Hubbard, 15 Q. B. 228 496
—— *v.* Jauncey, 8 C. & P. 99 204
—— *v.* Kemp, 7 Bing. 336 . . . . . 107, 108
—— *v.* —— (Ex. Ch.), 2 Bing. N. C. 102; 2 Scott, 9 . 33, 107, 108
—— *v.* Lea, 11 East, 312 478
—— *v.* Lewis, 11 C. B. 1035; 1 C. & K. 122 315
—— *v.* Manifold, 1 M. & S. 294 242
—— *v.* Mason, 1 Esp. 53 226
—— *v.* Mew, 7 A. & E. 240 223
—— *v.* Michael, 17 Q. B. 276 268
—— *v.* Mills, 2 A. & E. 17; 1 M. & Rob. 385 409
—— *v.* Morris, 3 A. & E. 46; 4 N. & M. 598 315
—— *v.* Needs, 2 M. & W. 129; 6 L. J. Ex. 59 494
—— *v.* Palmer, 16 Q. B. 747; 20 L. J. Q. B. 367; 15 Jur. 836 . 341
—— *v.* Pembroke (Earl of), 11 East, 504 302
—— *v.* Perkins, 3 T. R. 749 153
—— *v.* Phillips, 8 Q. B. 158; 16 L. J. Q. B. 269 244
—— *v* Pulman, 3 Q. B. 622; 11 L. J. Q. B. 319; 6 Jur. 1122 . 247
—— *v.* Randall, 2 M. & P. 20 300
—— *v.* Ridgway, 4 B. & Ald. 53 300
—— *v.* Robson, 15 East, 32; 13 R. R. 361 . . . . 167, 266
—— *v.* Roe, 1 M. & W. 207 565
—— *v.* Ross, 7 M. & W. 102; 10 L. J. Ex. 201; Cockle, L. C. 324 309
—— *v.* Samples, 8 A. & E. 151; 1 W. W. & H. 228; 2 Jur. 841; 3 N. & P. 254 244
—— *v.* Seaton, 2 A. & E. 171 247
—— *v.* Sleeman, 9 Q. B. 298; 15 L. J. Q. B. 338; 10 Jur. 568 . 297
—— *v.* Suckermore, 5 A. & E. 703; 2 N. & P. 16; W. W. & D. 405; Cockle, L. C. 327 . . . . . 46, 238
—— *v.* Thomas, 9 B. & C. 288 361
—— *v.* Turford, 3 B. & Ad. 890; Cockle, L. C. 192 . . 275, 276
—— *v.* Wainwright, 8 A. & E. 691 382
—— *v.* Walley, 8 B. & C. 22 246
—— *v.* Watkins, 3 Bing. N. C. 421; 4 Scott, 155 . . . 205
—— *v.* Whitehead, 8 A. & E. 571; 1 W. W. & H. 521; 2 Jur. 493 136
—— *v.* Wilson, 10 Moo. P. C. 502 . . . . . 48, 238
Dolder *v.* Huntingfield, 11 Ves. 292 131
Dominion Natural Gas Co. *v.* Perkins, 101 L. T. 359 . . . 147
Doncaster (Mayor of) *v.* Day, 3 Taunt, 262; 12 R. R. 650; Cockle, L. C. 230 . . . . . 89, 279
Doorman *v.* Jenkins, 2 A. & E. 256; 4 N. & M. 170 . . . 603
Dorin *v.* Dorin, L. R. 7 H. L. 577 484
Dorrett *v.* Meux, 15 C. B. 142; 23 L. J. C. P. 221 . . 223, 370
Dost Aly Khan, In the Goods of, 6 P. D. 6 40
Douglas, *In re*, 3 Q. B. 825; 12 L. J. Q. B. 49; 3 G. & D. 509; 7 Jur. 239 579
Dowdell *v.* Australian Royal Mail Co., 3 E. & B. 902; 2 C. L. R. 1656; 23 L. J. Q. B. 369; 18 Jur. 579 581
Dowden & Pook, Ltd. *v.* Pook, [1904] 1 K. B. 45; 73 L. J. K. B. 38; 89 L. T. 688; 52 W. R. 97 . . . . . 43, 603
Dowling *v.* Pontypool, etc., Rail Co., L. R. 18 Eq. 714 . . 475

PAGE
Dowson, *In re*, [1909] W. N. 245 474
Drughorn, Ltd. *v.* Rederiaktiebolaget Transatlantic, [1919] A. C. 203 161
Du Bost *v.* Beresford, 2 Camp. 511; 11 R. R. 782 . . . 64
Dudley, *In re*, 12 Q. B. D. 44 579
Dunraven (Earl of) *v.* Llewellyn, 15 Q. B. 791; 19 L. J. Q. B. 388; Cockle, L. C. 215 . . . . . 109, 296, 298
Dupuy *v.* Truman, 2 Y. & C. Ch. 341. 152
Durrell *v.* Bederley, Holt, 283 38
Dwyer *v.* Collins, 7 Ex. 639; 21 L. J. Ex. 225; 16 Jur. 569; Cockle, L. C. 314 . . . . . 317, 593, 595

E.

Eade *v.* Jacobs, 3 Ex. D. 335; 47 L. J. Ex. 74; 26 W. R. 159 . 540
Eagleton *v.* Kingston, 8 Ves. 438 . . . . . 45, 46
Earle *v.* Picken, 5 C. & P. 542 102
East London Rail. Co. *v.* Conservators of River Thames, 90 L. T. 347 131
Ecclesiastical Commissioners *v.* Treemer, [1893] 1 Ch. 166 . . 340
Ecklin *v.* Little, 6 T. L. R. 366 605
Eckroyd *v.* Coulthard, [1897] W. N. 25; 66 L. J. Ch. 751 . . 277
Edelstein *v.* Schuler & Co., [1902] 2 K. B. 144; 71 L. J. K. B. 572; 87 L. T. 204; 50 W. R. 493 . . . . . 132, 157
Eden *v.* Blake, 13 M. & W. 614; 14 L. J. Ex. 194; 9 Jur. 213 . 165
—— *v.* Weardale, etc., Co., 34 Ch. D. 223; 56 L. J. Ch. 178; 55 L. T. 860; 35 W. R. 235 551
Edmondson *v.* Birch & Co., Ltd., [1905] 2 K. B. 523 545
Edmunds *v.* Bushell, L. R. 1 Q. B. 97; 35 L. J. Q. B. 20; 14 W. R. 1 378
Egremont Burial Board *v.* Egremont Iron, etc., Co., 14 Ch. D. 158 554
Ehrmann *v.* Ehrmann, [1896] 2 Ch. 611 . . 367, 544, 584, 586
Elder *v.* Carter, 25 Q. B. D. 194; 55 L. J. Q. B. 281; 62 L. T. 516; 38 W. R. 612; 54 J. P. 692 565
Eldridge *v.* Knott, 1 Cowp. 215 347
Ellington *v.* Clark, 38 Ch. D. 332 609
Elliott *v.* Garrett, [1902] 1 K. B. 870 545
Ellis *v.* Allen, [1914] 1 Ch. 904 369
—— *v.* Bedford (Duke of), [1899] 1 Ch. 494 535
—— *v.* M'Henry, L. R. 6 C. P. 228; 40 L. J. C. P. 109; 19 W. R. 503 401
Elmer *v.* Creasy, L. R. 9 Ch. 69; 43 L. J. Ch. 166; 22 W. R. 141 542
Emanuel *v.* Symon, [1908] 1 K. B. 302 401
Emma Silver Mining Co., *In re*, L. R. 10 Ch. 194 572
Emmet *v.* Dewhirst, 21 L. J. Ch. 497 . . . . . 158, 163
Emmott *v.* Marchant, 3 Q. B. D. 555; 47 L. J. Q. B. 436; 38 L. T. 508; 26 W. R. 632 231
———— *v.* Star Newspaper Co., 62 L. J. Q. B. 77; 67 L. T. 829; 57 J. P. 201 321
———— *v.* ————————, 9 T. L. R. 111 569
Engall *v.* Bruce, 9 W. R. 536 593
England *v.* Slade, 4 T. R. 682; 2 R. R. 498 . . . . 345, 409
Ennis *v.* Carrol, 17 W. R. 344 277
Enoch and Zaretzky, Bock & Co.'s Arbitration, *In re*, [1910] 1 K. B. 327 . . . . . 27, 135, 466
Entick *v.* Carrington, 19 How. St. Tr. 1030 . . . . 20, 516
Eshenchunder Singh *v.* Shamachurn Bhutto, 11 Moo. Ind. App. 20 30
Evans *v.* Beattie, 5 Esp. 26 381

PAGE

Evans *v.* Benyon, 37 Ch. D. 329; 58 L. T. 700 613
—— *v.* Evans, [1904] P. 378 200
—— *v.* Manchester, Sheffield and Lincolnshire Rail. Co., 36 Ch. D. 626 535
—— *v.* Merthyr Tydfil U. D. C., [1899] 1 Ch. 241; 68 L. J. Ch. 175; 79 L. T. 578 . . . . . 232, 280, 613
—— *v.* Nichol, 3 Man. & G. 614 411
—— *v.* Pratt, 3 Man. & G. 759 480
—— *v.* Prothero, 1 De G. M. & G. 572 257
—— *v.* Rees, 10 A. & E. 151; 2 P. & D. 627 . . . 243, 298
—— *v.* ——, 12 A. & E. 55 513
—— *v.* Sweet, Ry. & M. 83; 1 C. & P. 277 592
—— *v.* Taylor, 7 A. & E. 617; 3 Nevile & P. 174 . . 232, 296
Everingham *v.* Roundell, 2 Moo. & R. 138 313
Exeter (Mayor of) *v.* Warren, 5 Q. B. 773; 8 Jur. 441 . . 272
Exmouth Dock Co., *In re*, L. R. 17 Eq. 181; 43 L. J. Ch. 110; 22 W. R. 104 416

F.

Faber *v.* Gosworth U. D. C., 88 L. T. 549 536
Fairfax Peerage Case, The, [1908] W. N. 226 302
Falcon *v.* Benn, 2 Q. B. 314 605
Falmouth (Earl of) *v.* Moss, 11 Price, 455 208
Fane *v.* Atlee (1700), Eq. Ca. Ab. 77 542
Farman *v.* Smith, 57 L. J. Ch. 637; 58 L. T. 12 455
Farquhar *v.* Newbury R. D. C., [1909] 1 Ch. 12 . . . 346, 347
Farr *v.* Price, 1 East, 56 258
Fawcett *v.* Fowlis, 7 B. & C. 394 342
Fawkes *v.* Lamb, 31 L. J. Q. B. 98 166
Fay *v.* Prentice, 1 C. B. 828. 130
Fengl *v.* Fengl, [1914] P. 274 212
Fennell *v.* Tait, 1 C. M. & R. 584; 5 Tyr. 218 576
Fenner and Lloyd, *In re*, [1897] 1 Q. B. 667 549
Fennessy *v.* Clark, 37 Ch. D. 184; 57 L. J. Ch. 398; 58 L. T. 289 542
Feret *v.* Hill, 15 C. B. 207 467
Field *v.* Bennett, 2 T. L. R. 91, 122 544
—— *v.* Sowle, 4 Russ. 112 145
—— *v.* Woods, 7 A. & E. 114; 2 N. & P. 117 259
Fielding *v.* Morley Corporation, [1899] 1 Ch. 1 504
Finch, *In re*, Finch *v.* Finch, 23 Ch. D. 267 454
Finny *v.* Govett, 25 T. L. R. 186 136
Fischer *v.* Sztaray, E. B. & E. 321; 27 L. J. Q. B. 239; 4 Jur. (N.S.) 632 588
Fisher *v.* Clement, 10 B. & C. 472 352
—— *v.* Owen, 8 Ch. D. 645; 47 L. J. Ch. 681; 38 L. T. 577; 26 W. R. 581 . . . . . 541, 543
—— *v.* Ronalds, 12 C. B. 762; 22 L. J. C. P. 62; 17 Jur. 393; 20 L. T. (o.s.) 100; 1 W. R. 54 194
—— *v.* Samuda, 1 Camp. 190, 193 311
Fitz *v.* Rabbits, 2 Moo. & R. 60 315
Fitzgibbon *v.* Greer, Ir. R. 9 C. L. 294 540
Fitzwalter Peerage Case, 10 Cl. & F. 193 46
Fleet *v.* Murton, L. R. 7 Q. B. 126; 41 L. J. Q. B. 49; 6 L. T. 181; 20 W. R. 97 58
—— *v.* Perrins, L. R. 3 Q. B. 536; 37 L. J. Q. B. 233; 9 B. & S. 575; 19 L. T. 147 375
Fletcher *v.* London and North Western Rail. Co., [1892] 1 Q. B. 122; 61 L. J. Q. B. 24; 65 L. T. 605; 40 W. R. 182 . . . 600

PAGE
Floyd *v.* Gibson, 100 L. T. 761 615
Foley's Charity *v.* Dudley Corporation, [1910] 1 K. B. 317 . . . 345
Folkes *v.* Chadd, 3 Doug. 157; Cockle, L. C. 118 . . . 42, 43, 57
Follett *v.* Jefferyes, 1 Sim. (N.S.) 1; 20 L. J. Ch. 65; 15 Jur. 118. 207
Foote *v.* Hayne, Ry. & M. 165; 1 C. & P. 545 204
Ford *v.* Yates, 2 Man. & G. 549 478
Formby Brothers *v.* E. Formby, [1910] W. N. 48; 102 L. T. 116 . 160
Foster *v.* Globe Venture Syndicate, [1900] 1 Ch. 811 132
——— *v.* Pointer, 9 C. & P. 718 593
——— *v.* Reeves, [1892] 2 Q. B. 255 392
——— *v.* Roberts, 29 Beav. 470 350
Foulds, *In re, Ex parte* Learoyd, 10 Ch. D. 3 . . . 221, 391
Fountaine, *In re*, [1909] 2 Ch. 382 267
Fowke *v.* Berington, [1914] 2 Ch. 308 40
Fox *v.* Star Newspaper Co., [1900] A. C. 19 600
—— *v.* Waters, 12 A. & E. 43 377
Frankenstein *v.* Gavin's Cycle, &c., Co., [1897] 2 Q. B. 62; 66 L. J. Q. B. 668; 76 L. T. 747; 45 W. R. 547 . . . 555, 562
Frederick *v.* Att.-Gen., L. R. 3 P. & D. 196; 44 L. J. P. & M. 1; 22 W. R. 416 304
Freeman *v.* Cooke, 2 Ex. 654; 6 Dowl. & L. 189; 18 L. J. Ex. 114; Cockle, L. C. 49 406
——— *v.* Phillipps, 4 M. & S. 486; 16 R. R. 524 . . . 292, 294
——— *v.* Steggal, 14 Q. B. 202; 19 L. J. Q. B. 18; 13 Jur. 1030 369
French *v.* Howie, [1906] 2 K. B. 674 394
Freston, *In re*, 11 Q. B. D. 545; 52 L. J. Q. B. 545; 49 L. T. 290; 31 W. R. 804 579
Frith *v.* Frith, [1906] A. C. 254 . . . . . 164, 167
Frost *v.* Brook, 23 W. R. 260 539
Fry *v.* Wood, 1 Atk. 445 279
Fryer *v.* Gathercole, 13 Jur. 542; Cockle, L. C. 121 51
——— *v.* ——— 4 Ex. 262 311
——— *v.* Sturt, 16 C. B. 218 581
Fuller *v.* Glyn, Mills, Currie & Co., [1914] 2 K. B. 168 . . . 408
Fulwood *v.* Fulwood, 9 Ch. D. 176; 47 L. J. Ch. 459; 38 L. T. 380; 26 W. R. 435 374
Furness *v.* Hall, 25 T. L. R. 233 397

G.

Gadd *v.* Mayor of Manchester, 9 R. P. C. 530 44
Gainsford *v.* Grammar, 2 Camp. 9; 11 R. R. 648 . . . 204, 369
Gale *v.* Williamson, 8 M. & W. 405; 10 L. J. Ex. 446 . . . 167
Gallagher *v.* Murton, 4 T. L. R. 304 476
Galloway *v.* Kenworth, 15 C. B. 228 581
Gandy *v.* Macaulay, *In re* Garnett, 31 Ch. D. 1 . . . 454, 455
Garden *v.* Cresswell, 2 M. & W. 319; 5 Dowl. 461 580
Gardner *v.* Irvin, 4 Ex. D. 49; 48 L. J. Ex. 224; 27 W. R. 443 . 562
——— *v.* Lucas, 3 App. Cas. 582 506
Garnett, *In re*, Gandy *v.* Macaulay, 31 Ch. D. 1 . . . 454, 455
Garrells *v.* Alexander, 4 Esp. 37 . . . . . 45, 238
Garth *v.* Howard, 8 Bing. 451; 5 C. & P. 346; 1 Moo. & Sc. 628 . 379
Gascoigne *v.* Gascoigne, [1918] 1 K. B. 223 406
Gaskill *v.* Skene, 14 Q. B. 664; 19 L. J. Q. B. 275; 14 Jur. 597 . 375
Gauntlett *v.* Whitworth, 2 Car. & K. 720 315
Gee *v.* Good, 29 L. T. (o.s.) 128 42
Geisel, *Ex parte*, 22 Ch. D. 436; 48 L. T. 405; 31 W. R. 264 . 304

PAGE
General Assurance, etc., Corporation *v.* Robertson, [1909] A. C. 404 422
General Estates Co., *In re*, L. R. 3 Ch. 758; 16 W. R. 919 . . 416
General Finance and Discount Co. *v.* Liberator Building Society, 10 Ch. D. 15; 27 W. R. 210 . . . . . 402, 403
Gent, *In re*, [1905] 1 Ch. 386 494
George *v.* Davies, [1911] 2 K. B. 445 132
——— *v.* Thyer, [1904] 1 Ch. 456; 73 L. J. Ch. 401; 90 L. T. 249 343
——— Whitechurch, Ltd. *v.* Cavanagh, [1902] A. C. 117...379, 408, 416
Gery *v.* Redman, 1 Q. B. D. 161; 45 L. J. Q. B. 267; 24 W. R. 270 270
Getty *v.* Getty, [1907] P. 334 455
Gibbon's Case, 17 How. St. Tr. 801 225
Gibbs, *In re*, [1907] 1 Ch. 465 . . . . . 477, 494
Giblin *v.* McMullen, L. R. 2 P. C. 317; 38 L. J. P. C. 25; 17 W. R. 445 601
Gibson *v.* Jeyes, 6 Ves. 277 350
Giffard *v.* Williams, 38 L. J. Ch. 604 233
Gill *v.* Gill, [1909] P. 157 496
—— *v.* Shelley, 2 Phill. 373 484
Gillett *v.* Abbott, 7 A. & E. 783 403
Gillette Safety Razor Co. *v.* Gamage, 25 T. L. R. 808 . . . 398
Ginger *v.* Ginger, L. R. 1 P. & D. 37; 35 L. J. P. & M. 9 . . 455
Glannibanta, The, 1 P. D. 283; 34 L. T. 934; 24 W. R. 1033 . 611
Glassington, *In re*, Glassington *v.* Follett, [1906] 2 Ch. 305 . 491, 497
Gleadow *v.* Atkin, 1 C. & M. 410 266
Glendarroch, The, [1894] P. 226; 63 L. J. P. 89; 70 L. T. 344; 6 R. 686 137
Glenie *v.* Tucker, [1908] 1 K. B. 263 412
Glenister *v.* Harding, 29 Ch. D. 985; 54 L. J. Ch. 1089; 53 L. T. 528 227
Glossop *v.* Heston Local Board, 47 L. J. Ch. 536; 26 W. R. 433 . 607
Goater, *Ex parte*, 22 W. R. 935 352
Goblet *v.* Beechey, 2 Russ. & My. 624 482
Godard *v.* Gray, L. R. 6 Q. B. 139; 40 L. J. Q. B. 62; 24 L. T. 89; 13 W. R. 348 400
Goddard's Case, 2 Rep. 4 b 167
Goffin *v.* Donnelly, 6 Q. B. D. 307; 50 L. J. Q. B. 303; 44 L. T. 141; 29 W. R. 440; 45 J. P. 439 472
Goldrei, Foucard & Son *v.* Sinclair, [1918] 1 K. B. 180 . . 394
Goldshede *v.* Swan, 1 Ex. 154; 16 L. J. Ex. 284 486
Goldstone *v.* Williams, Deacon & Co., [1899] 1 Ch. 47; 68 L. J. Ch. 24; 79 L. T. 373; 47 W. R. 91 236
Goodered *v.* Armorer, 3 Q. B. 956; 3 G. & D. 206; 12 L. J. Q. B. 56 595
Goodman *v.* Taylor, 5 C. & P. 410 147
Goodrich, *In re*, [1904] P. 138 229
Goodright *v.* Moss, Cowp. 591; Cockle, L. C. 211 . . . 302
Goodtitle *v.* Baldwin, 11 East, 488 345
——— *v.* Milburn, 2 M. & W. 853; 6 L. J. Ex. 209 . . 337
Goodwin *v.* Robarts, L. R. 10 Ex. 337 157
——— *v.* ———, 1 App. Cas. 476; 45 L. J. Ex. 748; 35 L. T. 179; 24 W. R. 987 417
Gordon *v.* Gordon, L. R. 5 H. L. 254 497
Gorrissen *v.* Perrin, 2 C. B. (N.S.) 681; 27 L. J. C. P. 29; 3 Jur. (N.S.) 867 482
Gosling *v.* Birnie, 7 Bing. 339; 5 M. & P. 160 410
Goss *v.* Nugent (Lord), 5 B. & Ad. 58; 2 N. & M. 28; Wigr. Wills, 5; 2 Ph. Ev. 354 . . . . . 157, 164
Gould *v.* Lakes, 6 P. D. 1; 49 L. J. P. & M. 59 495
Graham *v.* Belfast Ry., [1901] 2 Ir. R. 13 138

PAGE
Graham *v.* Sutton, [1897] 1 Ch. 761; 66 L. J. Ch. 320; 76 L. T. 369 . . . . . 563, 564
Grant *v.* Grant, L. R. 5 C. P. 727; 39 L. J. C. P. 272; 22 L. T. 821; 18 W. R. 951 . . . . . 483, 484, 497
—— *v.* Maddox, 15 M. & W. 737; 16 L. J. Ex. 227 480
—— *v.* Norway, 10 C. B. 665 360
Gray *v.* Haig, 20 Beav. 219 354
Great Torrington Commons Conservators *v.* Moore Stevens, [1904] 1 Ch. 347; 73 L. J. Ch. 124; 89 L. T. 667; 68 J. P. 111 . 358
Great Western Colliery Co. *v.* Tucker, L. R. 9 Ch. 376; 43 L. J. Ch. 518 543
Great Western Rail Co. *v.* Willis, 18 C. B. (N.S.) 748; 34 L. J. C. P. 195; Cockle, L. C. 177 378
Great Western Rail Co. and Midland Rail. Co. *v.* Bristol Corporation, 87 L. J. Ch. 414 501
Greaves *v.* Ashlin, 3 Camp. 426 168
——— *v.* Greenwood, 2 Ex. D. 289; 46 L. J. Ex. 252; 36 L. T. 1; 25 W. R. 639 356
Green *v.* Gatewick, Bull. N. P. 242 b. 89
Greenough *v.* Eccles, 5 C. B. (N.S.) 786; 28 L. J. C. P. 160; 5 Jur. (N.S.) 766; Cockle, L. C. 285 462
——————— *v.* Gaskell, 1 Myl. & K. 98 . . . . 204, 206
Greenwood *v.* Rothwell, 7 Beav. 291 554
Gregory *v.* Mighell, 18 Ves. 328 413
——— *v.* Molesworth, 3 Atk. 626 397
——— *v.* Tavernor, 6 C. & P. 280 . . . . . 124, 153
Greville *v.* Chapman, 5 Q. B. 731; D. & Mer. 553 38
——— *v.* Tylee, 7 Moo. P. C. 327 341
Gribbon *v.* Gribbon, 24 T. L. R. 160 586
Griffin, *In re*, 79 L. T. 442 454
Griffith *v.* Davies, 5 B. & Ad. 502 205
Grimwade *v.* Stephens (Kent Assizes, 1697), Bull. N. P. 294; cited in note 15 East, 294 301
Grove *v.* West, 7 Taunt. 39 110
Grumbrecht *v.* Parry, 32 W. R. 558 537
Gudgen *v.* Besset, 6 E. & B. 986 162
Guiard *v.* De Clermont, [1914] 3 K. B. 145 401
Gunn *v.* Tyrie, 6 B. & S. 298 488
Gwyn *v.* Neath, L. R. 3 Ex. 209; 37 L. J. Ex. 122; 16 W. R. 1209 402
Gyse *v.* Ellis, 1 Stra. 228 355

H.

Haddrick *v.* Heslop, 12 Q. B. 275 605
Hadley *v.* McDougall, L. R. 7 Ch. 312; 41 L. J. Ch. 504; 20 W. R. 393 559
Hagedorn *v.* Reid, 3 Camp. 377; 1 M. & S. 567 274
Haig *v.* West, [1893] 2 Q. B. 19; 62 L. J. Q. B. 532; 69 L. T. 165 345
Haigh *v.* Belcher, 7 C. & P. 389 466
Haines *v.* Guthrie, 13 Q. B. D. 818; 53 L. J. Q. B. 521; 51 L. T. 645; 33 W. R. 99; 48 J. P. 756 . . . . . 301, 303
Haire *v.* Wilson, 9 B. & C. 643; 4 M. & R. 605 352
Haldane *v.* Eckford, L. R. 7 Eq. 425 551
Hale *v.* Bates, E. B. & E. 575 581
Hales *v.* Kerr, [1908] 2 K. B. 601 112
Halhead *v.* Young, 6 E. & B. 312 159
Halkett *v.* Dudley (Earl of), [1907] 1 Ch. 590 . . . 222, 223, 309
Hall, *In re*, 9 Hare, Appendix xvi. 226

PAGE
Hall *v.* Bainbridge, 12 Q. B. 699; 17 L. J. Q. B. 317 . . . 340
—— *v.* Cazenove, 4 East, 477; 1 Smith, 272; 7 R. R. 611 . . 168
—— *v.* Hall, 25 T. L. R. 524 174
—— *v.* ——, [1892] 1 Ch. 361 477
—— *v.* Janson, 4 E. & B. 500; 3 C. L. R. 737; 24 L. J. Q. B. 97; 1 Jur. (N.S.) 571 480
—— *v.* London and North Western Rail. Co., 35 L. T. 848 367, 544
—— *v.* Truman, 29 Ch. D. 307; 54 L. J. Ch. 717; 52 L. T. 586 . 541, 562
Halliday *v.* Phillips, 23 Q. B. D. 48; [1891] A. C. 228 . . 346
Hamilton *v.* Kerwan, 2 Jo. & Lat. 393 349
Hammack *v.* White, 11 C. B. (N.S.) 594 147
Hammond *v.* Bradstreet, 10 Ex. 390; 23 L. J. Ex. 332 . 296, 299
—— —— *v.* Schofield, [1891] 1 Q. B. 453; 60 L. J. Q. B. 539 . 394
Hanbury *v.* Jenkins, [1901] 2 Ch. 401 . . . . . 108, 110
Hankey, *In re*, 25 W. R. 427 356
Hansen *v.* Dixon, 96 L. T. 32 448
Harden *v.* Hesketh, 4 H. & N. 175 374
Hardwick, *In re*, [1907] W. N. 180 536
Hardy *v.* Veasey, L. R. 3 Ex. 107; 37 L. J. Ex. 76 . . 209, 322
Hardy's Case, 24 How. St. Tr. 119, 451 . . 67, 152, 209, 464
Hargrave *v.* Hargrave, 2 Car. & K. 701 65
Hargreaves, Ltd., Joseph, *In re*, [1900] 1 Ch. 347 . . 234, 561
Harnor *v.* Groves, 15 C. B. 667; 3 C. L. R. 406 159
Harris, *In re*, 44 L. J. Bkcy. 33 253
—— *v.* Barber, 25 L. J. Q. B. 98 578
—— *v.* Knight, 15 P. D. 170; 62 L. T. 507 . . . 310, 336
—— *v.* Thompson, 13 C. B. 333 148
—— *v.* Tippett, 2 Camp. 637; Cockle, L. C. 279 . . . 467
Harrison *v.* Blades, 3 Camp. 458 88
—— —— *v.* Bush, 5 E. & B. 344 604
Harrod *v.* Harrod, 1 K. & J. 4; 18 Jur. 853 185
Hart *v.* Frontino Mining Co., L. R. 5. Ex. 111; 31 L. J. Ex. 93; 22 L. T. 30 415
—— *v.* Hart, 1 Hare, 1; 5 Jur. 1007; 11 L. J. Ch. 9 . 256, 315, 342
—— *v.* Macnamara, 4 Price, 154 n. 390
Hartley *v.* Hartley & Fleming, 35 T. L. R. 293 375
—— *v.* Wharton, 11 A. & E. 934; 3 P. & D. 529; 4 Jur. 576 . 143
Harvey *v.* Croydon Union Rural Sanitary Authority, 26 Ch. D. 249; 53 L. J. Ch. 707; 32 W. R. 389 371
—— *v.* Farnie, 8 App. Cas. 43; 5 P. D. 153; 49 L. J. P. D. & A. 33 401
—— —— *v.* Lovekin, 10 P. D. 122; 54 L. J. P. 1; 33 W. R. 188 . 546
—— —— *v.* Truro R. D. C., [1903] 2 Ch. 638 359
—— —— *v.* Wilde, L. R. 14 Eq. 438; 41 L. J. Ch. 698. . . . 396
Harwood *v.* Goodright, 1 Cowp. 87; 3 Wils. 497; 2 W. Bl. 937 . 354
Haslam *v.* Crow, 19 W. R. 969 302
Hatton *v.* Warren, 1 M. & W. 475 166
Hawes *v.* Draeger, 23 Ch. D. 173; 52 L. J. Ch. 449; 48 L. T. 518; 31 W. R. 576 344
Hayes *v.* Brown, [1920] 1 K. B. 250 336
Haynes *v.* Carter, 94 L. T. 431 343
—— —— *v.* Doman, [1899] 2 Ch. 13 . . . . . 43, 603
Hayslep *v.* Gymer, 1 A. & E. 163; 3 N. & M. 479 . . . 372
Heane *v.* Rogers, 9 B. & C. 577 364
Heath *v.* Deane, [1905] 2 Ch. 86 . . . . . 233, 247, 297
Heaton *v.* Goldney, [1910] 1 K. B. 754 538
Hebblethwaite *v.* Hebblethwaite, L. R. 2 P. & D. 29; 39 L. J. P. & M. 15 199

PAGE
Hebditch *v.* McIlwaine, [1894] 2 Q. B. 54 603
Heffield *v.* Meadows, L. R. 4 C. P. 595; 20 L. T. 746 . . . 482
Hegarty *v.* Milne, 14 C. B. 627 255
Henderson *v.* Arthur, [1907] 1 K. B. 10 . . . 32, 158, 165
——— *v.* Henderson, 3 Hare, 115 397
Hennell *v.* Davies, [1893] 1 Q. B. 367; 62 L. J. Q. B. 220; 68 L. T. 220; 41 W. R. 284; 5 R. 209 366
Hennessy *v.* Dompè, 19 R. P. C. 333 44
——— *v.* Keating, 25 R. P. C. 125 . . . . . 44, 435
——— *v.* Wright, 21 Q. B. D. 509 . . . . . 235, 561
——— *v.* ———, (No. 2), 24 Q. B. D. 445 n. . . . 537, 539
Henry Coxon, The, 3 P. D. 156; 47 L. J. Adm. 83; 3 L. T. 819 . 275, 276
Henry *v.* Leigh, 3 Camp. 498 591
Henwood *v.* Harrison, L. R. 7 C. P. 606 604
Heslop *v.* Chapman, 12 Q. B. 928 601
Hetherington *v.* Hetherington, 12 P. D. 112; 56 L. J. P. 78; 57 L. T. 533; 36 W. R. 12; 51 J. P. 119 . . 344
——— *v.* Kemp, 4 Camp. 193; Cockle, L. C. 83 . . 129
Hetley *v.* Hetley, [1902] 2 Ch. 866; 71 L. J. Ch. 769; 87 L. T. 265 494
Heugh *v.* Garrett, 44 L. J. Ch. 305; 32 L. T. 45 . . . 552
Hewett *v.* S.S. Duchess, 26 T. L. R. 300 146
Hewlett *v.* London County Council, 24 T. L. R. 331 . . . 407
Heyne *v.* Fischel, 110 L. T. 264 232
Hickman *v.* Haynes, L. R. 10 C. P. 598; 44 L. J. C. P. 358; 32 L. T. 873; 23 W. R. 872 163
Hicks *v.* Beaufort (Duke of), 4 Bing. N. C. 229; 5 Scott, 598; 2 Jur. 255 372
Higgins *v.* Senior, 8 M. & W. 834; 11 L. J. Ex. 199 . . . 160
Higgs *v.* Northern Assam Tea Co., L. R. 4 Ex. 387; 17 W. R. 1125 416
Higham *v.* Ridgway, 10 East, 109; 2 Sm. L. C. (12th ed.) 301 . 266
Highett and Bird, *In re*, [1903] 1 Ch. 287 335
Hill *v.* Manchester, etc., Water Works Co., 2 B. & Ad. 544; 2 N. & M. 573 225
Hinchliffe, *In re*, [1895] 1 Ch. 117; 64 L. J. Ch. 16; 71 L. T. 532; 43 W. R. 82; 12 R. 33 . . . . . 251, 548
Hitchings & Coulthurst Co. *v.* Northern Leather Co. of America, [1914] 3 K. B. 907 . . . . . 156, 165
Hoare *v.* Silverlock (No. 2), 9 C. B. 22 614
Hobbs *v.* Hudson, 25 Q. B. D. 232 547
Hobern *v.* Fowler, 62 L. J. Q. B. 49 579
Hodgson, *In re*, Beckett *v.* Ramsdale, 31 Ch. D. 177 . . . 454
Holcombe *v.* Hewson, 2 Camp. 391 32
Holden *v.* Hearn, 1 Beav. 445 380
Holdfast *v.* Dowsing, 2 Str. 1253; Bull. N. P. 264 . . . 241
Holdsworth *v.* Dimsdale, 19 W. R. 798 253
Holland, *In re*, [1902] 2 Ch. 360 55
Hollingham *v.* Head, 4 C. B. (N.S.) 388; 27 L. J. C. P. 241; 4 Jur. (N.S.) 379; Cockle, L. C. 97 . . . . . 56, 465
Hollis *v.* Goldfinch, 1 B. & C. 205 110
——— *v.* Young, [1909] 1 K. B. 629 . . . . . 146, 422
Holmes *v.* Mitchell, 7 C. B. (N.S.) 361; 6 Jur. (N.S.) 73 . . 490
Holt & Co. *v.* Collyer, 16 Ch. D. 718; 50 L. J. Ch. 311; 44 L. T. 214; 29 W. R. 502 479
Home *v.* Bentinck, 2 B. & B. 130 . . . . . 234, 316
Homersham *v.* Wolverhampton Rail. Co., 6 Ex. 137; 6 Rail. Cas. 790 155

PAGE
Honour *v.* Equitable Life Society, [1900] 1 Ch. 852 . . . 535
Hooton *v.* Dalby, [1907] 2 K. B. 18 540
Hope *v.* Beadon, 17 Q. B. 509; 2 L. M. & P. 593; 21 L. J. Q. B 25; 16 Jur. 80 592
—— *v.* Brash, [1897] 2 Q. B. 188; 66 L. J. Q. B. 653; 76 L. T. 823; 45 W. R. 659 . . . . . 539, 555
—— *v.* Hope, [1893] W. N. 21 277
—— *v.* l'Anson, 11 T. L. R. 201 603
—— *v.* Liddell, 20 Beav. 438 558
Hopkinson *v.* Burghley (Lord), L. R. 2 Ch. 447; 36 L. J. Ch. 605; 15 W. R. 543 . . . . . 560, 565
Horne *v.* Hough, L. R. 9 C. P. 135; 43 L. J. C. P. 70; 22 W. R. 412 539
——— *v.* Mackenzie, 6 Cl. & F. 628 154
Hornsey Local Board *v.* Monarch, etc., Society, 24 Q. B. D. 1 . 502
Houghton *v.* Kœnig, 18 C. B. 235; 25 L. J. C. P. 218 . . . 402
Houston, *In re*, 89 L. T. 469 499
Houstoun *v.* Sligo (Marquis of), 29 Ch. D. 448; 52 L. T. 96 . 393
Howard *v.* Beall, 23 Q. B. D. 1; 58 L. J. Q. B. 384; 60 L. T. 637; 37 W. R. 555 322
——— *v.* Clarke, 20 Q. B. D. 558; 58 L. T. 401; 52 J. P. 310 . 605
——— *v.* Dulau & Co., 11 T. L. R. 451 584
——— *v.* Sheward, L. R. 2 C. P. 148; 36 L. J. C. P. 42; 15 L. T. 183; 15 W. R. 45 56
Howatson *v.* Webb, [1908] 1 Ch. 1 404
Howe *v.* Malkin, 27 W. R. 340; 40 L. T. 196 65
Howes *v.* Barber, 18 Q. B. 588; 21 L. J. Q. B. 254; 16 Jur. 614 . 581
Howgate and Osborn's Contract, *In re*, [1902] 1 Ch. 451; 71 L. J. Ch. 279; 86 L. T. 180 . . . . . 342, 490
Hoyle's Case, *In re* London and Northern Bank, Ltd., [1903] 2 Ch. 73; 50 W. R. 386 . . . . . 203, 575
Hubbard *v.* Lees, L. R. 1 Ex. 255; 4 H. & C. 418; 35 L. J. Ex. 169; 12 Jur. (N.S.) 435; 13 L. T. 367; 14 W. R. 694 . . . 245, 302
Hubbuck, In the Estate of, [1905] P. 129 . . . . 485, 496
Hudson *v.* Clementson, 18 C. B. 213 157
——— *v.* Owners of Barge Swiftsure, 82 L. T. 389 . . . 271
Hughes *v.* Budd, 8 Dowl. 315 592
——— *v.* Cornelius, 2 Shower, 232; 2 Sm. L. C. 741 . . . 389
——— *v.* Vargus, 9 T. L. R. 551 234
Hulton & Co., E. *v.* Jones, [1910] A. C. 20 352
Humble *v.* Hunter, 12 Q. B. 310; 17 L. J. Q. B. 350; 12 Jur. 121 160, 161
Humfrey *v.* Dale, 7 E. & B. 266; E. B. & E. 1004 . . . 166
Humphries *v.* Humphries, [1910] 2 K. B. 531; 103 L. T. 14 . 392
Hunt *v.* Massey, 5 B. & Ad. 902; 3 N. & M. 109 . . . 337
Hunter *v.* Atkyns, 3 Myl. & K. 113 350
——— *v.* Stewart, 4 De G. F. & J. 168; 31 L. J. Ch. 346 . . 395
——— *v.* Walters, L. R. 7 Ch. 75 404
Huntley *v.* Gaskell, [1905] 2 Ch. 656 392
Hurst *v.* Usborne, 18 C. B. 144 480
Hutchinson *v.* Bowker, 5 M. & W. 535; 9 L. J. Ex. 24 . . 480
——————— *v.* Glover, 1 Q. B. D. 138; 45 L. J. Q. B. 120; 33 L. T. 605; 24 W. R. 185 553
Huxtable *v.* Crawford, [1902] 2 Ch. 793; 71 L. J. Ch. 876; 87 L. T. 415 494
Hyams *v.* Stuart King, [1908] 2 K. B. 696 606

I.

PAGE

Imperial Bank of Canada *v.* Bank of Hamilton, [1903] A. C. 49 . 412
Imperial Continental Water Corporation, *In re*, 33 Ch. D. 314 . 575
Ind, Coope & Co. *v.* Emmerson, 12 App. Cas. 300 . . . 554
Ingham *v.* Rayner, [1894] 2 Ch. 85; 63 L. J. Ch. 437; 70 L. T. 825; 42 W. R. 520; 7 R. 434 497
Ingilby *v.* Shafto, 33 Beav. 31; 32 L. J. Ch. 807 . . . 554
Irish Society *v.* Bishop of Derry, 12 Cl. & F. 668 . . . 232
Irving *v.* Motley, 7 Bing. 543 378
Isaacs & Sons *v.* Salbstein, [1916] 2 K. B. 139 . . . 394
Islington Vestry *v.* Hornsey Urban District Council, [1900] 1 Ch. 695 . . . . . 393, 536

J.

Jacker *v.* International Cable Co., 5 T. L. R. 13 615
Jackson, *In re*, Jackson *v.* Ward, [1907] 2 Ch. 354 . . . 356
——— In the Goods of, 87 L. T. 475 356
——— *v.* Thomason, 1 B. & S. 745; 31 L. J. Q. B. 11; 8 Jur. (N.S.) 134; 6. L. T. 104; 10 W. R. 42 462
Jacob *v.* Lee, 2 M. & Rob. 33 592
Jacobs *v.* Richards, 18 Beav. 303 145
James *v.* Hatfield, 1 Stra. 548 380
James Nelson & Sons, Ltd. *v.* Nelson Line, Ltd., [1906] 2 K. B. 217 . 550
Jardine *v.* Payne, 1 B. & Ad. 670 257
Jenkins *v.* Dunraven, 62 J. P. 661 . . . . 108, 296, 297
Jenks *v.* Dillon, 76 L. T. 591 577
Jenkyns *v.* Bushby, L. R. 2 Eq. 547; 35 L. J. Ch. 400, 820; 34 L. T. 431; 14 W. R. 531 205
Jenoure *v.* Delmege, [1891] A. C. 73; 60 L. J. P. C. 11; 63 L. T. 814; 39 W. R. 388 604
Jessel *v.* Bath, L. R. 2 Ex. 267; 36 L. J. Ex. 149; 15 W. R. 1041 . . . . . 360, 488
Jewison *v.* Dyson, 9 M. & W. 540; 2 M. & R. 377; 11 L. J. Ex. 401 . 345
Jewsbury *v.* Newbold, 26 L. J. Ex. 247 602
Johnson, *In re*, [1903] 1 Ch. 821 50
——— *v.* Appleby, L. R. 9 C. P. 158; 43 L. J. C. P. 146 . . 165
——— *v.* Barnes, L. R. 8 C. P. 527; 42 L. J. C. P. 259; 29 L. T. 65 . . . . . 344, 345
——— *v.* Hudson, 7 A. & E. 233 n 313
——— *v.* Lawson, 9 Moore, 183; 2 Bing. 86; Cockle, L. C. 209 . 300
——— *v.* Lyford, L. R. 1 P. & D. 546; 37 L. J. P. & M. 65 . 492
——— *v.* Marlborough (Duke of), 2 Stark. 313 346
——— *v.* Whittaker, 90 L. T. 535 554
Johnston *v.* Bloomfield, Ir. R. 8 C. L. 68 359
——— *v* Great Western Rail. Co., [1904] 2 K. B. 250 . . 43
Jolly *v.* Taylor, 1 Camp. 143 317
——— *v.* Young, 1 Esp. 186 478
Jones *v.* Frost, L. R. 7 Ch. 773; 42 L. J. Ch. 47; 27 L. T. 465; 20 W. R. 1025 404
——— *v.* Great Central Rail. Co., [1910] A. C. 4 . . . 208, 209
——— *v.* James, 18 L. T. 243 122
——— *v.* Jones, 22 Q. B. D. 425 547
——— *v.* ———, 24 T. L. R. 839 466
——— *v.* Lewis, [1919] 1 K. B. 328 391
——— *v.* Marshall, 2 C. B. (N.S.) 615 579
——— *v.* Monte Video Gas Co., 5 Q. B. D. 556; 49 L. J. Q. B. 627; 28 W. R. 758 . . . . . 541, 562

PAGE
Jones *v.* Richards, 15 Q. B. D. 439 . . . . . 47, 238, 539
——— *v.* Spencer, 77 L. T. 536 612
——— *v.* Stroud, 2 C. & P. 196 154
——— *v.* Tarleton, 9 M. & W. 675; 1 Dowl. (N.S.) 625; 6 Jur. 348 595
——— *v.* Wasley, 18 T. L. R. 418 164
——— *v.* Williams, 2 M. & W. 326; Cockle, L. C. 86 . 33, 108, 109
Jorden *v.* Money, 5 H. L. Cas. 185 408
Joseph *v.* Joseph, [1915] P. 122 455
Joseph Crosfield & Sons, Ltd., *In re*, [1910] 1 Ch. 118; (C. A.), *ibid.* 130 44
——— *v.* Techno-Chemical Laboratories, 29 T. L. R. 378 44
Joseph Hargreaves, Ltd., *In re*, [1910] 1 Ch. 347 . . 234, 561
Judd *v.* Judd, [1907] P. 241 455

K.

Kain *v.* Farrer, 37 L. T. 469 . . . . . 234, 561
Keeley *v.* Wakley, 9 T. L. R. 571 583
Kelly *v.* Solari, 9 M. & W. 54 412
Kempshall *v.* Holland, 14 R. 336 370
Kennedy *v.* Dodson, [1895] 1 Ch. 334 539
Kent *v.* Fittall (No. 3), [1909] 1 K. B. 215 56
Kent Coal Concessions *v.* Duguid, [1910] A. C. 452 . . . 562
Kenyon *v.* Birks, [1900] 1 Ch. 417; 69 L. J. Ch. 124; 81 L. T. 741 484
Kepitigalla Rubber Estates *v.* National Bank of India, 78 L. J. K. B. 964 412
Kettlewell *v.* Barstow, L. R. 7 Ch. 686; 41 L. J. Ch. 718; 27 L. T. 258; 20 W. R. 917 . . . . . 559, 563
Khajah Hidayut Oollah *v.* Rai Jan Khanum, 3 Moo. Ind. App. 295 303
Kibble *Ex parte*, L. R. 10 Ch. 373; 44 L. J. Bk. 63; 32 L. T. 138; 23 W. R. 433 393
Kimpton *v.* London and North Western Rail. Co., 9 Ex. 766; 2 C. L. R. 1026; 23 L. J. Ex. 232 579
King *v.* Henderson, [1898] A. C. 720 393
——— *v.* Hoare, 13 M. & W. 494 394
King of the Two Sicilies *v.* Wilcox, 1 Sim. (N.S.) 331 . . . 193
Kingston's Case (Duchess of), 20 How. St. Tr. 355; 2 Sm. L. C. 731; Cockle, L. C. 40 . . 152, 208, 386, 397, 399
———, 1 Leach, C. C. 146 390
Kirchner *v.* Venus, 12 Moo. P. C. 361; 7 W. R. 455; 6 Jur. (N.S.) 732 483
Kirkstall Brewery Co. *v.* Furness Rail. Co., L. R. 9 Q. B. 468 . 378
Kissam *v.* Link, [1896] 1 Q. B. 574; 65 L. J. Q. B. 433; 74 L. T. 368; 44 W. R. 452; 12 T. L. R. 333 321
Kitchin, *In re*, *Ex parte* Young, 17 Ch. D. 668 397
Klingeman, In the Goods of, 3 S. & T. 18; 32 L. J. P. M. & A. 16 49
Knapp *v.* Harvey, [1911] 2 K. B. 725 540
Knight *v.* Martin, Gow, 103 591
Knox *v.* Whalley, 1 Esp. 159 374
Kops *v.* The Queen, [1894] A. C. 650; 70 L. T. 890 . . 143, 178

L.

La Banque Jacques Cartier *v.* La Banque d'Epargne, etc., de Montreal, 13 App. Cas. 118; 57 L. J. P. C. 42 373

PAGE

Lafone *v.* Falkland Islands Co. (No. 1), 4 K. & J. 34; 27 L. J. Ch. 25; 6 W. R. 4 204
Lainson *v.* Tremere, 1 A. & E. 792; 3 N. & M. 603 . . . 403
Laird *v.* Briggs, 19 Ch. D. 22; 45 L. T. 238 504
Lamb *v.* Brewster, 4 Q. B. D. 607 509
Lambert, *In re*, 56 L. J. Ch. 122 302
——— and Butler *v.* Goodbody, 19 R. P. C. 377 . . . 44
L'Amie *v.* Wilson, [1907] 2 Ir. R. 130 322
L. & Y. Ry. Co., L. & N.-W. Ry. Co., and Graeser, Ltd. *v.* MacNicoll, 88 L. J. K. B. 601 406
Langen *v.* Tate, 24 Ch. D. 522; 32 W. R. 189 586
Langford *v.* Selmes, 3 K. & J. 220; 3 Jur. (N.S.) 859 . . . 409
Langham *v.* Sandford, 19 Ves. 649 495
Langhorn *v.* Allnutt, 4 Taunt. 511 . . . . . 378, 379
Latch *v.* Rumner Rail. Co., 27 L. J. Ex. 155 147
La Touche *v.* Hutton, Ir. R. 9 Eq. 166 270
Lawless *v.* Queale, 8 Ir. L. R. 382 384
Lawrence *v.* Campbell, 4 Drew. 485; 28 L. J. Ch. 780; 7 W. R. 336; 5 Jur. (N.S.) 1071 250
——— *v.* Clark, 14 M. & W. 250; 3 Dowl. & L. 87; 15 L. J. Ex. 40 592
Lawson *v.* Vacuum Brake Co., 27 Ch. D. 137; 54 L. J. Ch. 16; 33 W. R. 186 587
Leach *v.* Jay, 9 Ch. D. 42 477
—— *v.* R., [1912] A. C. 305 185
Lead Co. *v.* Richardson, 3 Burr. 1344 507
Learoyd, *Ex parte*, *In re* Foulds, 10 Ch. D. 3; 48 L. J. Bky. 17; 39 L. T. 525; 27 W. R. 277 . . . . . 221, 391
Lee *v.* Angas, L. R. 2 Eq. 59 572
—— *v.* Birrell, 3 Camp. 337; 1 M. & S. 482 235
—— *v.* Pain, 4 Hare, 201; 14 L. J. Ch. 346; 9 Jur. 127 . 493, 496
Leeds *v.* Amherst, 20 Beav. 239 353
Leeds and County Bank *v.* Walker, 11 Q. B. D. 84; 52 L. J. Q. B. 590; 47 J. P. 502 341
Leeke *v.* Portsmouth Corporation, 106 L. T. 627 . . . 33
Legge *v.* Edmonds, 25 L. J. Ch. 125; 4 W. R. 71 . . . 382
Leggott *v.* Great Northern Rail. Co., 1 Q. B. D. 599; 45 L. J. Q. B. 557; 35 L. T. 334; 24 W. R. 784 396
Leidemann *v.* Schultz, 14 C. B. 38; 2 C. L. R. 87; 23 L. J. Ch. 17; 18 Jur. 42 482
Leigh, In the Goods of, [1892] P. 82; 61 L. J. P. 124; 66 L. T. 379 310
Leigh *v.* Jack, 5 Ex. D. 264; 49 L. J. Ex. 220; 42 L. T. 463; 28 W. R. 452; 44 J. P. 488 359
Le Mesurier *v.* Le Mesurier, [1895] A. C. 517 401
Lennox, *Ex parte*, 16 Q. B. D. 315; 55 L. J. Q. B. 45; 54 L. T. 452; 34 W. R. 51 393
Leslie *v.* De la Torre, cited in 12 East, 583; 11 R. R. 578 . . 159
Levene *v.* Brougham, 25 T. L. R. 265 407
Lever Brothers *v.* Associated Newspapers, [1907] 2 K. B. 626 . 538
Lewes' Trusts, *In re*, L. R. 6 Ch. 356; 40 L. J. Ch. 602; 24 L. T. 533; 19 W. R. 195, 617 356
Lewis, *In re*, Prothero *v.* Lewis, [1910] W. N. 6 475
——— *v.* Cory, [1906] W. N. 95 609
——— *v.* Harris, 110 L. T. 337 104
——— *v.* Lewis, [1904] 2 Ch. 656 . . . . . 405, 409
——— *v.* Londesborough (Earl of), [1893] 2 Q. B. 191 . . 312, 563
——— *v.* Pennington, 29 L. J. Ch. 670; 8 W. R. 465; 6 Jur. (N.S.) 478 204

PAGE

Lewis *v.* Powell, [1897] 1 Ch. 678; 66 L. J. Ch. 463; 76 L. T. 282; 45 W. R. 438 558
—— *v.* Sapio, 1 M. & M. 39 46
—— *v.* Smith, 1 M. & G. 417 203
Liebman *v.* Pooley, 1 Stark. 167; 18 W. R. 756 313
Limehouse Board of Works, *Ex parte*, 24 Ch. D. 177; 52 L. J. Ch. 791; 48 L. T. 941; 32 W. R. 287 224
Lindley *v.* Lacey, 17 C. B. (N.S.) 578; 34 L. J. C. P. 7; 10 Jur. (N.S.) 1103; 11 L. T. 273; 12 W. R. 80 164
Lindsay *v.* Gladstone, L. R. 9 Eq. 132 564
Line *v.* Taylor, 2 F. & F. 731 325
Linzee *v.* Linzee, 29 L. J. P. & M. 128 . . . . . 216, 338
Lister *v.* Perryman, L. R. 4 H. L. 521; 39 L. J. Ex. 177; 23 L. T. 269; 19 W. R. 9. . . . . 84, 605
—— *v.* Smith, 3 Sw. & Tr. 282; 32 L. J. P. & M. 29 . . . 162
Little *v.* Kingswood Collieries Co., 20 Ch. D. 733; 51 L. J. Ch. 498; 31 W. R. 178 203
Llangattock (Lord) *v.* Watney, Combe, Reid & Co., Ltd., [1910] 1 K. B. 236; (in H. L.), [1910] A. C. 394 478
Llanover (Lady) *v.* Homfray, 19 Ch. D. 224; 30 W. R. 557 . 89, 279
Lloyd *v.* Morley, 5 L. R. Ir. 74 546
—— *v.* Mostyn, 10 M. & W. 478; 2 Dowl. (N.S.) 476; 12 L. J. Ex. 1 593
—— *v.* Powell Duffryn Steam Coal Co., [1914] A. C. 733 . . 266
Lloyd's Bank *v.* Cooke, [1907] 1 K. B. 794 412
Login *v.* Princess of Coorg, 30 Beav. 632 133
London (Mayor of) *v.* Lynn, 2 H. Bl. 214 n. 225
London and Globe Finance Corporation *v.* Kaufman, 69 L. J. Ch. 196; 48 W. R. 458 571
London and Northern Bank, Ltd., *In re*, Hoyle's Case, [1902] 2 Ch. 73; 50 W. R. 386 . . . . . 203, 575
London Association of Shipowners *v.* London and India Docks, [1892] 3 Ch. 242 535
London Celluloid Co., *In re*, 39 Ch. D. 190 415
London Chartered Bank of Australia *v.* White, 4 App. Cas. 422; 48 L. J. C. P. 75 132
London, Chatham and Dover Rail. Co. *v.* Ball, 47 L. T. 413 . 374
London County Council *v.* South Metropolitan Gas Co., [1904] 1 Ch. 76 476
London Gas Meter Co., Ltd., *In re*, 41 L. J. Ch. 145; 20 W. R. 394 575
London General Omnibus Co. *v.* Lavell, [1901] 1 Ch. 135 . 44, 327
London Joint Stock Bank, Ltd. *v.* Macmillan and Arthur, [1918] A. C. 777 412
Long Wellesley's Case, 2 Russ. & M. 639 579
Longman *v.* Bath Electric Tramways, Ltd., [1905] 1 Ch. 646 . 408
Lord *v.* Colvin, 1 Drew. & Sm. 24; 28 L. J. Ch. 361; 29 L. J. Ch. 297; 8 W. R. 254; 6 Jur. (N.S.) 189 133
Louisiana (Bank of) *v.* Bank of New Orleans, 43 L. J. Ch. 269 . 408
Love *v.* Bell, 9 App. Cas. 286; 53 L. J. Q. B. 257; 32 W. R. 725 137
Loveden *v.* Loveden, 2 Hagg. Cons. 1 424
Lovell *v.* Wallis, 53 L. J. Ch. 494; 49 L. T. 593 607
Low *v.* Bouverie, [1891] 3 Ch. 82; 60 L. J. Ch. 594; 65 L. T. 533; 40 W. R. 50 408
—— *v.* General Steam Fishing Co., [1909] A. C. 523 . . 146, 361
Lowden *v.* Blakey, 23 Q. B. D. 332; 58 L. J. Q. B. 617; 38 W. R. 64 . . . . . 250, 555
Lowe *v.* Dorling, 74 L. J. K. B. 794 259
Lucas *v.* Bristow, E. B. & E. 907; 27 L. J. Q. B. 364; 5 Jur. (N.S.) 68 482

PAGE
Lucas *v.* De la Cour, 1 M. & S. 249; 11 R. R. 426 376
—— *v.* Williams & Sons, [1892] 2 Q. B. 113; 61 L. J. Q. B. 595; 66 L. T. 706 . . . . . 126, 169, 325
Lucy *v.* Mouflet, 5 H. & N. 229; 29 L. J. Ex. 110 375
Ludlow (Mayor of) *v.* Charlton, 6 M. & W. 815 155
Lumley *v.* Gye, 3 E. & B. 114; 23 L. J. Q. B. 112 577
Lyell, *v.* Kennedy, 27 Ch. D. 1 . . . . . 203, 544, 557
—— *v.* ——, 8 App. Cas. 217 541
—— *v.* ——, 23 Ch. D. 387; 9 App. Cas. 81 205, 250, 545, 557
—— *v.* ——, 14 App. Cas. 437 . . . . . 228, 300, 302
Lyle *v.* Ellwood, L. R. 19 Eq. 98; 44 L. J. Ch. 164; 23 W. R. 157 . 343

M.

Maass *v.* Gas Light and Coke Co., [1911] 2 K. B. 543 . . . 545
McCall *v.* Australian Meat Co., 19 W. R. 188 603
MacConnell *v.* Prill & Co., [1916] 2 Ch. 57 502
M'Cormick *v.* Garnett, 5 De G. M. & G. 278; 28 L. J. Ch. 717 . 50
M'Corquodale *v.* Bell, 1 C. P. D. 471 557
McCorquodale *v.* ——, [1876] W. N. 39 541
M'Cullough *v.* Munn, [1908] 2 Ir. R. 194 325
Macdonald *v.* Longbottom, 29 L. J. Q. B. 256 480
McDonald *v.* Owners of Steamship Banana, [1908] 2 K. B. 926 . 146
Macdougall *v.* Knight, 25 Q. B. D. 1; 59 L. J. Q. B. 517; 63 L. T. 43; 88 W. R. 553 396
—— *v.* Pursier, 2 Dow & Cl. 135 345
M'Fadden *v.* Murdock, 15 W. R. 1079 42
Macgregor *v.* Keily, 3 Ex. 794; 18 L. J. Ex. 391; 2 D. & L. 635 . 130
McGregor *v.* Telford, [1915] 3 K. B. 237 399
M'Kenire *v.* Fraser, 9 Ves. 5 246
M'Kenzie *v.* British Linen Co., 6 App. Cas. 82 406
Mackley *v.* Chillingworth, 2 C. P. D. 273; 46 L. J. C. P. 484; 25 W. R. 650 581
McLeod *v.* Power, [1898] 2 Ch. 295; 67 L. J. Ch. 551; 47 W. R. 74; 79 L. T. 67 394
McMahon *v.* McElroy, 5 Ir. R. Eq. 1 356
McQuire *v.* Western Morning News Co., [1903] 2 K. B. 100; 72 L. J. K. B. 612; 88 L. T. 757; 51 W. R. 689 604
Maddick *v.* Marshall, 18 C. B. (N.S.) 829 378
Maddison *v.* Alderson, 8 App. Cas. 467; 52 L. J. Q. B. 737; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821 408
Magee, *Ex parte*, 15 Q. B. D. 332; 54 L. J. Q. B. 394; 33 W. R. 655 219
Magnay *v.* Knight, 1 Man. & G. 944; 2 Scott, N. R. 64; 14 Jur. 1088 256
Mahony *v.* National Widows' Life Assurance Fund, L. R. 6 C. P. 252; 40 L. J. C. P. 203; 24 L. T. 548; 19 W. R. 722 . . 560
Mahood *v.* Mahood, Ir. R. 8 Eq. 359 354
Makin *v.* Att.-Gen. for N. S. Wales, [1894] A. C. 57; 63 L. J. P. C. 41; 69 L. T. 778; 6 R. 373; 58 J. P. 148; 17 Cox, C. C. 704 . . . . . 35, 111, 120
Malcolmson *v.* O'Dea, 10 H. L. Cas. 593; 9 L. T. 93; 12 W. R. 178; 9 Jur. (N.S.) 1135 247
Mallan *v.* May, 13 M. & W. 511 478
Malone *v.* Fitzgerald, 18 L. R. Ir. 187 544
Malpas *v.* Clements, 19 L. J. Q. B. 435 337
—— *v.* London and South Western Rail. Co., L. R. 1 C. P. 336; 35 L. J. C. P. 166; 13 L. T. 760; 14 W. R. 391; 1 H. & R. 227; 12 Jur. (N.S.) 271 164

PAGE
Maltby *v.* Christie, 1 Esp. 340; Cockle, L. C. 157 . . . 372
Manby *v.* Scott, 2 Smith's L. C. 446; 1 Lev. 4 381
Mander *v.* Ridgway, [1898] 1 Q. B. 501; 67 L. J. Q. B. 335; 78 L. T. 118; 46 W. R. 366 259
Mangena *v.* Wright, [1909] 2 K. B. 958; 78 L. J. K. B. 879; 100 L. T. 960 392
Manning *v.* London and North Western Rail. Co., 23 T. L. R. 222 57
Manzoni *v.* Douglas, 6 Q. B. D. 145; 50 L. J. Q. B. 289; 29 W. R. 425 603
Mappin *v.* Liberty, [1903] 1 Ch. 118 359
Marine Investment Co. *v.* Haviside, L. R. 5 H. L. 624; 42 L. J. Ch. 173 . . . . . 256, 310, 340
Markey and Another *v.* Tolworth, etc., Hospital District Board, [1900] 2 Q. B. 454 508
Marks *v.* Beyfus, 25 Q. B. D. 494; 59 L. J. Q. B. 479; 63 L. T. 733; 38 W. R. 705 210
Marriage *v.* Lawrence, 3 B. & Ald. 142 225
Marriott *v.* Chamberlain, 17 Q. B. D. 154; 55 L. J. Q. B. 448; 54 L. T. 714; 34 W. R. 783 540
Marshall *v.* Cliff, 4 Camp. 133 370
——— *v.* Ford, 99 L. T. 796 . . . . . 594, 595
——— *v.* Wild Rose, [1909] 2 K. B. 46 . . . . 146, 361
Martin *v.* Andrews, 7 E. & B. 1; 26 L. J. Q. B. 39; 2 Jur. (N.S.) 1121 581
—— *v.* British Museum, 10 T. L. R. 215 545
——— *v.* Treacher, 16 Q. B. D. 507; 55 L. J. Q. B. 209; 54 L. T. 7; 34 W. R. 315 . . . . . 192, 547
Mason *v.* Motor Traction Co., [1905] 1 Ch. 419 . . 256, 310, 481
Massey *v.* Allen, 13 Ch. D. 558; 49 L. J. Ch. 76; 41 L. T. 788; 28 W. R. 212 . . . . . 269, 277
Master *v.* Miller, 1 Sm. L. C. 803 . . . . . 258, 490
Mather *v.* Maidstone (Lord), 1 C. B. (N.S.) 273; 26 L. J. C. P. 58; 3 Jur. (N.S.) 112 349
Matheson *v.* Ross, 2 H. L. Cas. 301 257
Matthews, In the Goods of, [1898] P. 17; 67 L. J. P. 11; 77 L. T. 630 356
——— *v.* Smallwood, [1910] 1 K. B. 777 499
Maugham *v.* Hubbard, 8 B. & C. 14; 2 M. & R. 5; Cockle, L. C. 266 . . . . . 151, 152, 243
Maunsell *v.* Ainsworth, 8 Dowl. 869; 1 H. & W. 5 . . . 579
May *v.* Platt, [1900] 1 Ch. 616 164
Maynard *v.* Consolidated Kent Collieries Corporation, [1903] 2 K. B. 121; 72 L. J. K. B. 681; 88 L. T. 676; 52 W. R. 117 . . 257
Meath (Bishop of) *v.* Winchester (Marquis of), 3 Bing. N. C. 183; Cockle, L. C. 333 244
Medley *v.* London United Tramways, 26 T. L. R. 315 . . . 600
Meekins *v.* Smith, 1 H. Bl. 636 579
Melbourne Banking Corporation *v.* Brougham, 7 App. Cas. 307; 51 L. J. C. P. 65; 30 W. R. 925 . . . 139, 144, 155, 403
Mellor *v.* Walmsley, [1905] 2 Ch. 164 275
Melville's (Lord) Case, 29 How. St. Tr. 549 . . 102, 131, 380
Mercantile Bank of Sydney *v.* Taylor, [1893] A. C. 317; 57 J. P. 741 159
Mercantile Investment, etc., Co. *v.* River Plate, etc., Co., [1894] 1 Ch. 578; 63 L. J. Ch. 366; 70 L. T. 131; 42 W. R. 365 . 395
Mercer *v.* Denne, [1905] 2 Ch. 538 . 213, 216, 232, 233, 275, 277, 293
——— *v.* Whall, 5 Q. B. 447; 14 L. J. Q. B. 267; 9 Jur. 576; Cockle, L. C. 133 597
Meredith *v.* Footner, 11 M. & W. 202; 12 L. J. Ex. 183 . . 381

PAGE

Merivale *v.* Carson, 20 Q. B. D. 275; 58 L. T. 331; 36 W. R. 231; 52 J. P. 261 . . . . . 604, 615
Merttens *v.* Hill, [1901] 1 Ch. 842 346
Messina *v.* Petrococchino, L. R. 4 P. C. 144; 8 Moo. P. C. C. (N.S.) 375 400
Metropolitan Asylum District *v.* Hill, 47 L. T. 29 . . . 41, 42
Metropolitan Rail. Co. *v.* Jackson, 3 App. Cas. 193; 47 L. J. C. P. 303; 37 L. T. 679; 26 W. R. 175 . . . 603
——— *v.* Wright, 11 App. Cas. 152 . . . 611, 612
Metropolitan Water Board *v.* New River Co., 20 T. L. R. 689 . 510
Meunier, *In re*, [1894] 2 Q. B. 415; 63 L. J. M. C. 198; 71 L. T. 403; 42 W. R. 637 452
Mexborough (Earl of) *v.* Whitwood U. D. C., [1897] 2 Q. B. 111; 66 L. J. Q. B. 637; 76 L. T. 765; 45 W. R. 564 . 195, 542, 551
Micklethwait *v.* Newlay Bridge Co., 33 Ch. D. 133 . . . 359
Middleton *v.* Melton, 10 B. & C. 317; 5 M. & R. 264 . . 268, 381
Mighell *v.* Sultan of Johore, [1894] 1 Q. B. 149; 63 L. J. Q. B. 593; 70 L. T. 64; 58 J. P. 244 132
Milbank *v.* Milbank, [1900] 1 Ch. 376 . . . . . 541, 552
Milissich *v.* Lloyd's, 46 L. J. C. P. 404; 25 W. R. 353 . . . 144
Millard *v.* Bailey, L. R. 1 Eq. 378; 35 L. J. Ch. 312; 13 L. T. 751; 14 W. R. 385 483
Miller *v.* Dent, 10 Q. B. 846 257
——— *v.* Kirwan, [1903] 2 Ir. R. 120 541
——— *v.* Waterford Harbour Commissioners, [1904] 2 Ir. R. 421 . 551
Millner, *In re*, L. R. 14 Eq. 245; 42 L. J. Ex. 44; 26 L. T. 825; 20 W. R. 823 357
Mills *v.* Barber, 1 M. & W. 427; 5 Dowl. 77; 2 Gale, 5 . . 136
——— *v.* Oddy, 6 C. & P. 728 318
Milne *v.* Leisler, 7 H. & N. 786; 31 L. J. Ex. 257; 5 L. T. 802; 10 W. R. 250; 8 Jur. (N.S.) 121 56
Milner *v.* Harewood (Lord), 18 Ves. 274 404
Milton *v.* Studd, [1910] 2 K. B. 118 142
Minet *v.* Morgan, L. R. 8 Ch. 361; 42 L. J. Ch. 627; 28 L. T. 573; 21 W. R. 467 . . . . . 202, 554, 555
Minna Craig, etc. *v.* Chartered, etc., Bank, [1897] 1 Q. B. 460 . 390
Mir Asadulah *v.* Bibi Imaman, 5 Cal. N. R. P. C. 26 . . . 444
Moises *v.* Thornton, 8 T. R. 303; 3 Esp. 4 226
Mold *v.* Williams, 5 Q. B. 473 397
Monkton *v.* Att.-Gen., 2 Russ. & My. 147 . . . 294, 301, 303
Monro *v.* Twistleton, Peake, Add. Ca. 221 200
Montague *v.* Harrison, 3 C. B. (N.S.) 292; 27 L. J. C. P. 24; 4 Jur. (N.S.) 29 579
Montgomerie *v.* Ferris, 20 L. R. Ir. 282 394
Moor *v.* Roberts, 3 C. B. (N.S.) 671 541
Moore *v.* Crofton, 3 Jo. & Lat. 438 163
——— *v.* Oxford (Bishop of), [1904] A. C. 283 454
——— *v.* Peachey, [1891] 2 Q. B. 707 549
——— *v.* Ransome, 14 T. L. R. 539 57
Morel *v.* Westmoreland, [1904] A. C. 11 394
Morewood *v.* Wood, 14 East, 328 n.; 12 R. R. 537 295
Morgan, *Ex parte*, 2 Ch. D. 72; 45 L. J. Bk. 43; 24 W. R. 418 . 602
———, *In re*, 39 Ch. D. 316; 60 L. T. 71; 37 W. R. 243 . . 538
——— *v.* Couchman, 14 C. B. 100; 2 C. L. R. 53; 23 L. J. C. P. 36 374
——— *v.* Nicholl, L. R. 2 C. P. 117; 36 L. J. C. P. 86; 15 L. T. 184; 15 W. R. 110; 12 Jur. (N.S.) 963 89
Moriarty *v.* London, Chatham and Dover Rail. Co., L. R. 5 Q. B. 314; 39 L. J. Q. B. 109; 22 L. T. 163; 18 W. R. 625 . . 373
Morland *v.* Isaac, 20 Beav. 392 374

PAGE
Morris *v.* Baron & Co., [1918] A. C. 1 . . . . 157, 163, 165
——— *v.* Bethell, L. R. 5 C. P. 47; 38 L. J. C. P. 379; 17 W. R. 736 412
——— *v.* Davies, 5 Cl. & F. 163; 3 C. & P. 215, 427; 1 M. & R. 271 n. 342, 344
——— *v.* Edwards, 15 App. Cas. 309; 60 L. J. Q. B. 292; 63 L. T. 26 . . . . . 541, 552, 554, 562
——— *v.* Hanser, 2 M. & Rob. 392; Car. & M. 29 593
——— *v.* Miller, 4 Burr. 2057; Cockle, L. C. 91 343
Morrison *v.* Lennard, 3 C. & P. 127 186
——— *v.* Moat, 9 Hare, 241 208
Mortimer *v.* M'Callan, 6 M. & W. 58; Cockle, L. C. 321...316, 330, 595
Moseley *v.* Victoria Rubber Co., 55 L. T. 482; 3 R. P. C. 351 . 208
Motteram *v.* Eastern Counties Rail. Co., 7 C. B. (N.S.) 58; 29 L. J. M. C. 57; 6 Jur. (N.S.) 759 226
Mouflet *v.* Cole, L. R. 8 Ex. 35 299
Moult *v.* Halliday, [1898] 1 Q. B. 129; 67 L. J. Q. B. 451; 77 L. T. 794; 47 W. R. 318; 62 J. P. 8 132
Mourmand *v.* Le Clair, [1903] 2 K. B. 216 . . . . 485, 496
Mowatt *v.* Castle Steel, etc., Co., 34 Ch. D. 58 416
Moxham, The M., 1 P. D. 116; 24 W. R. 597 587
Muirhead *v.* Commercial Cable Co., 11 R. P. C. 317 . . . 411
Muller *v.* Baldwin, L. R. 9 Q. B. 457 . . . . . 503, 505
Munday, Ltd. (J. R.) *v.* L. C. C., [1916] 2 K. B. 331 . . . 366
Municipal Building Society *v.* Kent, 9 App. Cas. 260 . . . 503
Musgrave *v.* Emerson, 10 Q. B. 326; 16 L. J. Q. B. 174 . . 272
Myers *v.* Sarl, 3 E. & E. 306; 30 L. J. Q. B. 9; 7 Jur. (N.S.) 97 . 481, 482

N.

Nadin *v.* Bassett, 25 Ch. D. 21; 53 L. J. Ch. 253; 49 L. T. 454; 32 W. R. 70 . . . . . 584, 586
Nash *v.* Layton, [1911] 2 Ch. 71 539
National Association, etc. *v.* Smithies, [1906] A. C. 434; 75 L. J. K. B. 861; 95 L. T. 71 . . . . . 541, 558
Neale *v.* Gordon-Lennox, [1902] A. C. 465 370
Neaverson *v.* Peterborough, etc., Council, [1902] 1 Ch. 557; 71 L. J. Ch. 378; 86 L. T. 738; 50 W. R. 549 346
Neile *v.* Jakle, 2 Car. & K. 709 372
Neill *v.* Devonshire (Duke of), 8 App. Cas. 135; 2 L. R. Ir. 154 . 60, 293, 345
Neilson *v.* Betts, L. R. 5 H. L. 1; 40 L. J. Ch. 317; 19 W. R. 1121 144
Nelson *v.* Bridport (Lord), 8 Beav. 527; 10 Jur. 871 . . . 40
——— *v.* Dahl, 12 Ch. D. 568 157
——— *v.* Whittall, 1 B. & Ald. 19 241
Nelson (James) & Sons, Ltd. *v.* Nelson Line, Ltd., [1906] 2 K. B. 217 550
Nepean *v.* Doe, 2 M. & W. 894; 2 Smith's L. C. 610; Cockle, L. C. 29 355
Nesbitt *v.* Parrett, 18 T. L. R. 510 612
Nevil *v.* Johnson, 2 Vern. 447 89
New *v.* Burns, 64 L. J. Q. B. 104 584
New London Credit Syndicate *v.* Neale, [1898] 2 Q. B. 487; 67 L. J. Q. B. 505; 78 L. T. 283; 46 W. R. 420 164
New, Prance and Garrard's Trustee *v.* Hunting, [1897] 2 Q. B. 19; 66 L. J. Q. B. 554; 76 L. T. 742; [1899] A. C. 419 . 91, 197
New Westminster Brewery Co. *v.* Hannah, 1 Ch. D. 278; 24 W. R. 137 607

PAGE
New Zealand (Bank of) *v.* Simpson, [1900] A. C. 182 . . . 484
Newall, *Ex parte, In re* Newall, 3 Mont. & Ayr. 666 . . . 280
Newbiggin Gas Co. *v.* Armstrong, 13 Ch. D. 310; 49 L. J. Ch. 231; 41 L. T. 637; 28 W. R. 217 547
Newbould *v.* Smith, 29 Ch. D. 883 268
Newby *v.* Sharpe, 8 Ch. D. 39; 47 L. J. Ch. 617; 38 L. T. 583; 26 W. R. 685 606
Newcastle (Duke of) *v.* Broxtowe (Hundred of), 4 B. & Ad. 273; Cockle, L. C. 219 295
——— *v.* Clark, 8 Taunt. 626 108
Newell *v.* Radford, L. R. 3 C. P. 52; 37 L. J. C. P. 1; 17 L. T. 118; 16 W. R. 97 487
Newton *v.* Chaplin, 10 C. B. 356; 19 L. J. C. P. 374; 14 Jur. 1121 557
——— *v.* Harland, 1 Man. & G. 956; 1 Scott, N. R. 502; 9 Dowl. 16; 4 Jur. 992 581
——— *v.* Ricketts, 9 H. L. Cas. 262; 31 L. J. Ch. 247 . 48, 435
Nichol *v.* Godts, 10 Ex. 191; 23 L. J. Ex. 314 159
——— *v.* Jones, 2 H. & M. 588 556
——— *v.* Vaughan, 1 Cl. & F. 49 145
Nicholls *v.* Dowding, 1 Stark. 81; Cockle, L. C. 265 . . . 459
——— *v.* Parker, 14 East, 331 n. 295
Nicholson, *Ex parte*, 14 Ch. D. 243; 49 L. J. Bk. 68; 43 L. T. 266; 28 W. R. 936 573
——— *v.* Bradfield Union, L. R. 1 Q. B. 620 . . . 155
Nifa, The, [1892] P. 411; 62 L. J. P. 12; 69 L. T. 56 . . . 480
Noble *v.* Kennoway, 2 Doug. 510 58
——— *v.* Ward, L. R. 2 Ex. 135; 15 L. T. 672; 15 W. R. 520 . 163
Noell *v.* Wells, 1 Lev. 235 223
Norden *v.* Dempsey, 1 C. P. D. 654 482
Norey *v.* Keep, [1909] 1 Ch. 561; 78 L. J. Ch. 334; 100 L. T. 322; 25 T. L. R. 289 563
Normanshaw *v.* Normanshaw, 69 L. T. 468 208
North Cheshire, etc., Brewery Co. *v.* Manchester Brewery Co., [1899] A. C. 83 44
North Eastern Rail. Co. *v.* Dalton Overseers, [1898] 2 Q. B. 66; 67 L. J. Q. B. 66; 78 L. T. 524; 46 W. R. 582; 62 J. P. 484 . . . 393
——— *v.* Hastings, [1900] A. C. 260; 69 L. J. Ch. 516; 82 L. T. 429. 476
North of England Ship Insurance Co. *v.* Armstrong, L. R. 5 Q. B. 244; 39 L. J. Q. B. 81; 22 W. R. 520 159
Northam Bridge Co. *v.* S. Stoneham Rural Council, 71 J. P. 345 . 345
Northern Assam Tea Co., *In re*, L. R. 10 Eq. 458; 18 W. R. 126 . 416
Norwich Equitable Fire Insurance Co., *In re*, 27 Ch. D. 515 . 575
Nottingham (Guardians of) *v.* Tomkinson, 4 C. P. D. 343; 48 L. J. M. C. 171; 28 W. R. 151 . . . . 124, 174, 175
Nouvion *v.* Freeman, 15 App. Cas. 1; 59 L. J. Ch. 337; 62 L. T. 189; 38 W. R. 581 399
Nye *v.* Macdonald, L. R. 3 P. C. 331; 39 L. J. P. C. 34; 23 L. T. 220; 18 W. R. 1075 220

O.

O'Connor *v.* Majoribanks, 4 Man. & G. 435; 11 L. J. C. P. 267 . 200, 252
Offin *v.* Rochford Rural Council, [1906] 1 Ch. 342 . . . 359
Ofner, *In re*, [1909] 1 Ch. 60; 78 L. J. Ch. 50; 99 L. T. 813 . 493

PAGE
Omichund *v.* Barker, Willes, 538; Cockle, L. C. 260 . . . 189
Ongley *v.* Hill, [1874] W. N. 157 585
Oppenheim *v.* Sheffield, [1893] 1 Q. B. 5; 62 L. J. Q. B. 167; 67 L. T. 606; 41 W. R. 65; 4 R. 111 543
Ormerod *v.* St. Georges, [1905] 1 Ch. 505 563
O'Rourke *v.* Darbishire, [1920] A. C. 581 . . . . . 250, 555
Orr-Ewing *v.* Johnson, 7 App. Cas. 219 44
Osborne *v.* London Dock Co., 10 Ex. 698; 3 C. L. R. 313; 24 L. J. Ex. 140; 1 Jur. (N.S.) 93 193
O'Shea *v.* Wood, [1891] P. 286; 60 L. J. P. 83; 65 L. T. 30 . 250, 559
Osram, etc. *v.* Gabriel Lamp Co., [1914] 2 Ch. 129 542
Outram *v.* Morewood, 5 T. R. 121; 3 East, 346; 7 R. R. 473 . 248
Owen *v.* Moberley, 64 J. P. 88 448
——— *v.* Thomas, 3 Myl. & K. 353 . . . . . 256, 369
Owner *v.* Beehive Spinning Co., [1914] 1 K. B. 105 . . . 316
Oxford (Mayor of) *v.* Crow, [1893] 3 Ch. 535; 69 L. T. 228 . . 155

P.

Paddock *v.* Forrester, 3 Man. & G. 903; 2 Scott, N. R. 734 . . 253
Paine *v.* Bevan and Bevan, 110 L. T. 933 412
Palmer's Case, Stephen, Hist. Cr. L., III. 389 . . . . 41, 445
Pankhurst *v.* Hamilton, 2 T. L. R. 682 . . . . . 539, 540
——— *v.* Wighton, 2 T. L. R. 745 539
Papendick *v.* Bridgwater, 5 E. & B. 166; 24 L. J. Q. B. 289; 1 Jur. (N.S.) 657; Cockle, L. C. 201 . . . . . 270, 382
Pardy's Mozambique Syndicate *v.* Alexander, [1903] 1 Ch. 191; 76 L. J. Ch. 104; 88 L. T. 11; 51 W. R. 295 . . . . 549, 563
Pares *v.* Pares, 33 L. J. Ch. 215 349
Parker *v.* Great Western Rail. Co., 7 Scott, N. R. 870 . . 509
Parkin *v.* Moon, 7 C. & P. 408; Cockle, L. C. 272 464
Parnell *v.* Wood, [1892] P. 137; 66 L. T. 670; 40 W. R. 554 . 321
Parrott *v.* Watts, 47 L. J. C. P. 79; 37 L. T. 755 64
Parry *v.* May, 1 M. & Rob. 279; 5 Tyr. 685 591
Parsons *v.* Brown, 3 Car. & K. 295 285
Partridge *v.* Coates, Ry. & M. 156; 1 C. & P. 534 591
Pattle *v.* Hornibrook, [1897] 1 Ch. 25; 66 L. J. Ch. 144; 75 L. T. 475; 45 W. R. 123 . . . . . 157, 162, 194, 195
Paxton *v.* Douglas, 16 Ves. 242 229
Payne *v.* Bennett, [1904] P. 138; 23 L. J. P. 33; 90 L. T. 170 . 168
——— *v.* Hughes, 10 Ex. 430 44
Payton *v.* Snelling, 17 R. P. C. 635 340
Peaceable *v.* Watson, 4 Taunt. 16; Cockle, L. C. 200 . . . 168
Peacock *v.* Harris, 10 East, 104 . . . . . 292, 556
Pearce *v.* Foster, 15 Q. B. D. 114 240
——— *v.* Hooper, 3 Taunt. 60; Cockle, L. C. 335 111
Peardon *v.* Underhill, 20 L. J. Q. B. 133 406
Pearl Mill Co. *v.* Ivy Tannery Co., [1919] 1 K. B. 78 . . . 247
Pearson *v.* Beck, 8 Ex. 452 580
——— *v.* Isles, 2 Doug. 556 114
——— *v.* Lemaitre, 5 Man. & G. 700; 6 Scott, N. R. 607; 12 L. J. Q. B. 253; 7 Jur. 748. . . . . 377, 543
Peek *v.* Ray, [1894] 3 Ch. 282; 63 L. J. Ch. 647; 70 L. T. 769; 42 W. R. 498 544
Pegler *v.* King, L. R. 9 C. P. 9 . . . . . 400, 401
Pemberton *v.* Hughes, [1899] 1 Ch. 781; 68 L. J. Ch. 281; 80 L. T. 369; 47 W. R. 354 457
Penniman *v.* Hill, 24 W R. 245 . . . . . .

PAGE
Penrhyn *v.* Licensed Victuallers' Mirror, 7 T. L. R. 1 . . 538
Percival *v.* Nanson, 7 Ex. 1; 21 L. J. Ex. 1 . . 267, 271, 274
Perkins *v.* Jeffery, [1915] 2 K. B. 702 111
——— *v.* Vaughan, 4 M. & Gr. 988; 5 Scott, N. R. 881; 12 L. J. C. P. 38; 6 Jur. 1114 63
Permanent Trustee, &c., Co. *v.* Fels, [1918] A. C. 879 . . . 215
Perring *v.* Hone, 4 Bing. 28; 12 Moore (C. P.) 135; 2 C. & P. 401 490
Petch *v.* Lyon, 9 Q. B. 147; 15 L. J. Q. B. 393 369
Peter Walker & Son, Ltd. *v.* Hodgson, [1909] 1 K. B. 239 . . 538
Peto *v.* Hague, 5 Esp. 134; Cockle, L. C. 178 378
Petrie *v.* Nuttall, 11 Ex. 569; 25 L. J. Ex. 200 . . . 57, 399
Peyton *v.* St. Thomas' Hospital, 4 M. & R. 625 n. . . . 378
Phelps *v.* Prew, 3 E. & B. 430; 23 L. J. Q. B. 140; 2 C. L. R. 1422; 18 Jur. 249 318
Phené's Trusts, *In re*, L. R. 5 Ch. 139; 39 L. J. Ch. 316; 22 L. T. 111; 18 W. R. 303 . . . . . 355, 356
Phibbs, In the Estate of, [1917] P. 93 339
Philipps *v.* Halliday, [1891] A. C. 228; 64 L. T. 745; 55 J. P. 741 . . . . . 345, 346
Philipson *v.* Chase, 2 Camp. 111 595
Phillipps *v.* Briard, 1 H. & N. 21; 25 L. J. Ex. 233 . . . 166
Phillips *v.* Cole, 10 A. & E. 106; 2 P. & D. 289; 4 Jur. 83 . . 268
——— *v.* Martin, 15 App. Cas. 193 611
——— *v.* Routh, L. R. 7 C. P. 287 544
Phipps *v.* New Claridge's Hotel, Ltd., 22 T. L. R. 49 . . . 138
Phosphate Sewage Co. *v.* Molleson, 4 App. Cas. 801 . . . 613
Pickard *v.* Sears, 6 A. & E. 474 406
Pickering *v.* Pickering, 25 Ch. D. 247 563
Piers *v.* Piers, 2 H. L. Cas. 331; 13 Jur. 569 . . . 342, 343
Pilkington *v.* Gray, [1899] A. C. 401; 68 L. J. P. C. 63 . 242, 339
Pinney *v.* Pinney, 8 B. & C. 335 . . . . . 223, 224
Pipe *v.* Fulcher, 1 E. & E. 111; 2 L. J. Q. B. 12 . . . 297
Plancq *v.* Marks, 94 L. T. 577 450
Plant *v.* Bourne, [1897] 2 Ch. 281; 66 L. J. Ch. 643; 76 L. T. 820 487
——— *v.* Taylor, 7 H. & N. 211; 31 L. J. Ex. 289; 8 Jur. (N.S.) 140 301
Plumbley *v.* Lock, 67 J. P. 237 . . . . . 110, 359
Plymouth, etc., Tramways Co. *v.* General Tolls Co., Ltd., 75 L. T. 467; (H. L.) 14 T. L. R. 531 507
Plymouth Mutual Co-operative Society, Ltd. *v.* Traders' Publishing Association, Ltd., [1906] 1 K. B. 403 545
Pollock *v.* Garle, [1898] 1 Ch. 1; 66 L. J. Ch. 788; 77 L. T. 415; 46 W. R. 66 322
Pomfret *v.* Lancashire and Yorkshire Rail. Co., [1903] 2 K. B. 718 . . . . . 136, 146, 603
Poole *v.* Dicas, 1 Bing. N. C. 649; 2 L. J. C. P. 47; 1 Sc. 600 . 275
——— *v.* Warren, 8 A. & E. 588; 3 N. & P. 693 240
Pooley *v.* Goodwin, 4 A. & E. 94; 5 N. & M. 466 256
Porter *v.* Moore, [1904] 2 Ch. 367 409
Postlethwaite *v.* Rickman, 35 Ch. D. 722 556
Poulett Peerage Case, [1903] A. C. 395; 68 L. J. Ch. 281; 80 L. T. 369; 47 W. R. 354 . . . . . 65, 124, 175, 344
Poulton *v.* Adjustable, etc., Co., [1908] 2 Ch. 430 386, 389, 398, 418
Powell *v.* Browne, 97 L. T. 854 403
——— *v.* Edmunds, 12 East, 6; 13 R. R. 785 165
Praed *v.* Graham, 24 Q. B. D. 53 . . . . . 34, 114
Price *v.* Burva, 6 W. R. 40 372
——— *v.* Hollis, 1 M. & S. 105 217
——— *r.* Ley, 32 L. J. Ch. 530; 4 Giff. 235 158

PAGE

Price *v.* Manning, 42 Ch. D. 372; 58 L. J. Ch. 649; 61 L. T. 537; 37 W. R. 785 461
——— *v.* Torrington (Earl of), 1 Salk. 285; 2 Ld. Raym. 873; 2 Sm. L. C. 294 274
Priestman *v.* Thomas, 9 P. D. 70, 210; 53 L. J. P. D. & A. 58; 32 W. R. 842 . . . . . 386, 397
Prince *v.* Samo, 7 A. & E. 627; 7 L. J. Q. B. 123; 3 N. & P. 139; Cockle, L. C. 276 470
Printing, etc., Co. *v.* Drucker, [1894] 2 Q. B. 801; 64 L. J. Q. B. 58; 71 L. T. 172; 42 W. R. 674 . . . . . 89, 91, 279
Prioleau *v.* United States and Johnson, L. R. 2 Eq. 659; 14 L. T. 700 547
Pritchard *v.* Bagshawe, 11 C. B. 459; 20 L. J. C. P. 161 . . 374
———— *v.* Draper, 1 Russ. & My. 191 377
———— *v.* Powell, 10 Q. B. 589 295
Pritt *v.* Fairclough, 3 Camp. 305 274
Procter *v.* Raikes, 3 T. L. R. 229 545
——— *v.* Smiles, 55 L. J. Q. B. 467, 527 . . . . 204, 545
——— *v.* ———, 2 T. L. R. 474 558
Property Insurance Co., Ltd., *In re*, [1914] 1 Ch. 775 . . . 575
Prothero *v.* Lewis, *In re* Lewis, [1910] W. N. 6 475
Provincial Insurance Co. *v.* Leduc, 22 W. R. 939 . . . 413
Pryor *v.* Petrie, [1894] 2 Ch. 11; 63 L. J. Ch. 531; 70 L. T. 331; 42 W. R. 435 359
Pugh *v.* Robinson, 1 T. R. 116 131
Pye *v.* Butterfield, 5 B. & S. 829; 34 L. J. Q. B. 17; Cockle, L. C. 292 . . . . . 195, 542
Pym *v.* Campbell, 6 E. & B. 370; 25 L. J. Q. B. 277; 27 L. T. 122; 4 W. R. 528; 20 Jur. 641; Cockle, L. C. 348 . . 157, 162
Pym Brothers *v.* Coyle, [1903] 2 Ir. R. 457 394

Q.

Quartz Hill, etc., Co., *In re*, *Ex parte* Young, 21 Ch. D. 642 . 608
———————— *v.* Beall, 20 Ch. D. 501; 51 L. J. Ch. 874; 46 L. T. 746; 30 W. R. 583 608
Queen's Case, The, 2 B. & B. 284 . . . . . 190, 309, 470
Queen's Proctor *v.* Fry, 4 P. D. 230; 48 L. J. P. D. & A. 68 . 229
Quick *v.* Quick, 3 Sw. & Tr. 442; 33 L. J. P. & M. 146; 12 W. R. 119; 10 Jur. (N.S.) 682 495
Quilter *v.* Heatly, 23 Ch. D. 42; 48 L. T. 373; 31 W. R. 331 . 548

R.

R. *v.* Abbott, 67 J. P. 151 72
— *v.* Abramovitch, 112 L. T. 480 . . . . . 189, 335
— *v.* Aickles, 1 Leach, C. C. 294; 2 East, P. C. 968 . . . 594
— *v.* All Saints, Worcester, 6 M. & S. 194 194
— *v.* Appleby, 3 Stark. 33 101
— *v.* Atkins, 24 T. L. R. 807 530
— *v.* Attwood, 1 Leach, C. C. 464 452
— *v.* Austin, Dears. C. C. 612; 7 Cox, C. C. 55; 25 L. J. M. C. 48; 2 Jur. (N.S.) 95 285
— *v.* Avery, 8 C. & P. 596 205
— *v.* Badash, 118 L. T. 179 336
— *v.* Baines, [1909] 1 K. B. 258 . . . . . 515, 572
— *v.* Baird, 113 L. T. 608 118
— *v.* Baldry, 2 Den. C. C. 430; Cockle, L. C. 182 . . 96, 98

PAGE
R. *v.* Ball, 1 Camp. 324 116
— *v.* ——, [1911] A. C. 47 106
— *v.* Banks, [1916] 2 K. B. 621 519
— *v.* Barnsley, 1 M. & S. 377 373
— *v.* Barraclough, [1906] 1 K. B. 201 113
— *v.* Barron, 110 L. T. 350 116
— *v.* Basingstoke, 14 Q. B. 611 384
— *v.* Baskerville, [1916] 2 K. B. 658 451
— *v.* Beard, [1920] A. C. 479 353
— *v.* Beauchamp, 73 J. P. 223 452
— *v.* Bedfordshire, 4 E. & B. 535 298
— *v.* Bedingfield, 14 Cox, C. C. 341; Cockle, L. C. 66 . . . 62
— *v.* Bell, 7 T. R. 600 507
— *v.* Bennett, 25 T. L. R. 528 528
— *v.* Benson, [1908] 2 K. B. 270 526
— *v.* Berger, [1894] 1 Q. B. 823; 63 L. J. Q. B. 529; 70 L. T. 807; 42 W. R. 541; 58 J. P. 416 293
— *v.* Bernadotti, 11 Cox, C. C. 316 74
— *v.* Best, [1909] 1 K. B. 692 . . . . . 19, 104, 444
— *v.* Betridge, 73 J. P. 71 530
— *v.* Bexley, 70 J. P. 263 85
— *v.* Bickley, 73 J. P. 239; 2 Cr. App. R. 53 . . . 451, 455
— *v.* Biggin, [1920] 1 K. B. 213 . . . . . 121, 177, 522
— *v.* Bird, 79 L. T. 359; 47 W. R. 112; 62 J. P. 760 . . . 179, 519
— *v.* Birmingham (Overseers of), 1 B. & S. 763; 31 L. J. M. C. 63 172, 268, 269, 271
— *v.* Bispham, 4 C. & P. 392 468
— *v.* Black, 74 J. P. 71 512
— *v.* Blackburn, 6 Cox, C. C. 333; 3 Car. & K. 330 . . . 99
— *v.* Blake, 6 Q. B. 126; 13 L. J. M. C. 131; 8 Jur. 145 . . 66
— *v.* Bliss, 7 A. & E. 550; Cockle, L. C. 218 . . . 292, 296
— *v.* Bolus, 23 L. T. 339 140
— *v.* Bond, [1906] 2 K. B. 389 119
— *v.* Boswell, Car. & M. 584 97
— *v.* Boyes, 1 B. & S. 311; 30 L. J. Q. B. 301; Cockle, L. C. 290 193, 199, 287
— *v.* Boyle, 20 T. L. R. 192 179
— *v.* —— and Merchant, [1914] 3 K. B. 339 118
— *v.* Boynes, 1 Car. & K. 65 219
— *v.* Braintree, 1 E. & E. 51; 28 L. J. M. C. 1 315
— *v.* Brampton, 10 East, 202 339
— *v.* Brasier, 1 Leach, C. C. 199; Cockle, L. C. 251 . . 78, 187
— *v.* Brewer, 6 C. & P. 363 204
— *v.* Bridgwater, [1905] 1 K. B. 131 180
— *v.* Brightside Bierlow and Others (Inhabitants of), 19 L. J. M. C. 50 111
— *v.* Brixton Prison (Governor of), [1907] 1 K. B. 696 . 132, 218
— *v.* Broadhempston, 1 E. & E. 154; 28 L. J. M. C. 18; 5 Jur. (N.S.) 267 338
— *v.* Bromhead, 71 J. P. 103 . . . . . 35, 85
— *v.* Brown, L. R. 1 C. C. R. 70; 36 L. J. M. C. 59 . . . 468
— *v.* Brownell, 1 A. & E. 598; 3 L. J. M. C. 118 . . . 580
— *v.* Buckley, 13 Cox. C. C. 293; Cockle, L. C. 195 . . . 277
— *v.* —— (Long), 7 East, 45 340
— *v.* Bulmer, L. & C. 476 525
— *v.* Burdett, 4 B. & Ald. 95, 314 424
— *v.* Burditt, 6 Cox, C. C. 458; Dears. C. C. 431 . . . 467
— *v.* Butcher, 64 J. P. 808 283
— *v.* Campbell (Douglas), 6 Cr. App. R. 131 . . . .

PAGE

R. *v.* Cass, 1 Leach, C. C. 293 n. 97
— *v.* Chatham, 8 East, 498 373
— *v.* Chitson, [1909] 2 K. B. 945 178
— *v.* Christian, Car. & M. 388 215
— *v.* Christie, [1914] A. C. 545 . . . . . 36, 63, 87, 371
— *v.* City of London Court (Judge of the), [1892] 1 Q. B. 273 . 505
— *v.* Cleary, 2 F. & F. 853 74
— *v.* Clerk, 1 Salk. 377 325
— *v.* Clewes, 4 C. & P. 221 97
— *v.* Cockburn, Dears. & B. C. C. 203; 8 Cox, C. C. 265; 19 L. J. M. C. 119 284
— *v.* Cohen, [1914] W. N. 160; 111 L. T. 77 . . . . 178, 451
— *v.* Cook, 1 C. & P. 321 513
— *v.* Cooper, 1 Q. B. D. 19 . . . . . 34, 35, 112, 117
— *v.* Corrie, 68 J. P. 294 179
— *v.* Costello, [1910] 1 K. B. 28 504
— *v.* Cotton, 3 Camp. 444 294
— *v.* Court, 7 C. & P. 486 98
— *v.* Cox, 4 F. & F. 42 219
— *v.* ——, 14 Q. B. D. 153; 54 L. J. M. C. 41; 52 L. T. 25; 33 W. R. 396; 49 J. P. 374; 15 Cox, C. C. 611 . 207, 556
— *v.* ——, [1898] 1 Q. B. 179; 67 L. J. Q. B. 293; 77 L. T. 534; 18 Cox, C. C. 672 . . . . . 52, 142
— *v.* Cramp, 5 Q. B. D. 307; 14 Cox, C. C. 390 455
— *v.* Cresswell, 1 Q. B. D. 446; 45 L. J. M. C. 77; 13 Cox, C. C. 126; 33 L. T. 760; 24 W. R. 281 339
— *v.* Cunningham, 5 East, 478 507
— *v.* Curgerwen, L. R. 1 C. C. R. 1; 35 L. J. M. C. 58; 11 Jur. (N.S.) 984; 13 L. T. 383; 14 W. R. 55; 10 Cox, C. C. 152 . 140, 349
— *v.* Curnock, 111 L. T. 816 63
— *v.* Davies, 114 L. T. 80 . . . . . 187, 450
— *v.* Day, 19 L. T. 35 283
— *v.* Daye, [1908] 2 K. B. 333 . . . . . 518, 572, 580
— *v.* Debenham, 2 B. & Ald. 185 247
— *v.* De Berenger, 3 M. & S. 67 130
— *v.* Denio, 7 B. & C. 620 315
— *v.* Dibble, 72 J. P. 498 452
— *v.* Dickenson, 73 J. P. 287 . . . . . 121, 530
— *v.* Dixon, 3 M. & S. 15; 4 Camp. 12; 15 R. R. 381 . . . 351
— *v.* Doherty, 13 Cox, C. C. 23 97
— *v.* Drew, 8 C. & P. 140 96
— *v.* Drury, 18 L. J. M. C. 189 398
— *v.* East Mark, 11 Q. B. 877; 3 Cox, C. C. 60; 17 L. J. Q. B. 887; 12 Jur. 332 345
— *v.* Edmunds, 25 T. L. R. 658 71
— *v.* Edwards, 73 J. P. 286 121
— *v.* ———, 8 Cr. App. R. 38 530
— *v.* Edwinstowe, 8 B. & C. 671 373
— *v.* Ellicombe, 5 C. & P. 522 594
— *v.* Elliott, 100 L. T. 976 528
— *v.* Ellis, [1910] 2 K. B. 746 118
— *v.* Elworthy, L. R. 1 C. C. R. 103; 37 L. J. M. C. 3; 17 L. T. 293; 16 W. R. 207; 10 Cox, C. C. 579 . . . 317, 594
— *v.* Emery, [1909] 2 K. B. 81 186
— *v.* England, 2 Leach, C. C. 770 287
— *v.* Enoch, 5 C. & P. 539 95
— *v.* Erdheim, [1896] 2 Q. B. 260; 65 L. J. M. C. 176; 74 L. T. 734; 44 W. R. 607; 3 Manson, 142 . . . . 197, 364, 575

PAGE
R. *v.* Eriswell (Inhabitants of), 3 T. R. 707; Cockle, L. C. 152...89, 264, 280, 283, 287
— *v.* Everest, 73 J. P. 269 451
— *v.* Exeter, L. R. 4 Q. B. 341; 10 B. & S. 433; 38 L. J. M. C. 127 269
— *v.* Fagent, 7 C. & P. 238 75
— *v.* Farrell, L. R. 2 C. C. R. 116; 43 L. J. M. C. 94; 12 Cox, C. C. 605; 29 L. T. 404; 22 W. R. 518 284
— *v.* Feigenbaum, [1919] 1 K. B. 431 . . . . . 84, 452
— *v.* Fennell, 7 Q. B. D. 147; 50 L. J. M. C. 126; 44 L. T. 687; 29 W. R. 742; 45 J. P. 666; 14 Cox, C. C. 607 . . . 98
— *v.* Ferrand, 3 B. & Ald. 269 325
— *v.* Fisher, [1910] 1 K. B. 149 . . . . . 35, 118, 120
— *v.* Folley, 60 J. P. 569 77
— *v.* Foote, 26 L. J. M. C. 79 283
— *v.* Fordingbridge, E. B. & E. 678; 27 L. J. M. C. 290; 4 Jur. (N.S.) 951 338
— *v.* Foster, 6 C. & P. 325; Cockle, L. C. 67 62
— *v.* ———, 8 C. & P. 107 452
— *v.* Fowkes, Stephen, Dig. Law Ev., art. 3 61
— *v.* Francis, L. R. 2 C. C. R. 128; 43 L. J. M. C. 97; 12 Cox, C. C. 612; 30 L. T. 503; 22 W. R. 663 . . . 118, 328, 427
— *v.* Freston, 11 Q. B. D. 545 579
— *v.* Ganz, 9 Q. B. D. 93; 51 L. J. Q. B. 419; 46 L. T. 592 . . 291
— *v.* Garbett, 1 Den. C. C. 236; 2 Car. & K. 474 . . . 193, 194
— *v.* Gardner, [1899] 1 Q. B. 150; 68 L. J. Q. B. 42; 79 L. T. 358; 47 W. R. 77; 62 J. P. 743; 19 Cox, C. C. 177 . . 178, 522
— *v.* Garland, [1910] 1 K. B. 154 526
— *v.* Garner, 2 Car. & K. 920; 1 Den. C. C. 329 97
— *v.* Gaunt, L. R. 2 Q. B. 466; 36 L. J. M. C. 89; 2 B. & S. 365 399
— *v.* Gawthrop, 59 J. P. 377 287
— *v.* Gazard, 8 C. & P. 595 90
— *v.* Geering, 18 L. J. M. C. 215; Cockle, L. C. 99 . . . 35, 117
— *v.* George, Car. & M. 111 453
— *v.* ——— (1908), 1 Cr. App. R. 168 519
— *v.* Gibbons, 1 C. & P. 97; Cockle, L. C. 188 . . . . 96, 97
— *v.* ———, 31 L. J. M. C. 98 34
— *v.* Gibson, 18 Q. B. D. 537; 56 L. J. M. C. 49; 56 L. T. 267; 35 W. R. 411; 51 J. P. 742; 16 Cox, C. C. 181 . . . 63
— *v.* Gilles, 11 Cox, C. C. 69; 14 W. R. 845 95
— *v.* Girod, 22 T. L. R. 720 35
— *v.* Gloster, 16 Cox, C. C. 471 . . . . . 69, 72, 74
— *v.* Glynne, L. R. 7 Q. B. 16; 41 L. J. M. C. 58; 26 L. T. 61; 20 W. R. 94 399
— *v.* Goddard, 15 Cox, C. C. 7 72
— *v.* Godstone R. D. C., [1911] 2 K. B. 465 251
— *v.* Gordon (Lord George), 21 How. St. Tr. 535 64
— *v.* ———, 1 Leach, C. C. 515 . . . . . 144, 168, 336
— *v.* Gould, 9 C. & P. 364; Cockle, L. C. 185 101
— *v.* Gray, 4 F. & F. 1102 116
— *v.* Green, 6 C. & P. 655 99
— *v.* Gregory, 15 L. J. M. C. 38; 8 Q. B. 505; 10 Jur. 387 . . 287
— *v.* Griffin, 6 Cox, C. C. 219 208
— *v.* Griggs, Sir T., Raym. 2 183
— *v.* Grout, 26 T. L. R. 60 180
— *v.* Gutteridge, 9 C. & P. 471 284
— *v.* Hadwen and Ingham, [1902] 1 K. B. 882; 71 L. J. K. B. 581; 86 L. T. 601; 50 W. R. 589; 66 J. P. 456 . . 101, 178, 453, 467, 521
— *v.* Halkett, [1910] 1 K. B. 50 507

PAGE
R. *v.* Hall, 11 Cr. App. R. 221 530
— *v.* —— 14 Cr. App. R. 58 530
— *v.* Halworth, 4 C. & P. 254 594
— *v.* Hamilton, 118 L. T. 180 336
— *v.* Hampshire, 1 Cr. App. R. 212 531
— *v.* Hardwick (Inhabitants of), 11 East, 577 . . 66, 377, 378
— *v.* Hardy, 24 How. St. Tr. 119, 451 . . 67, 152, 209, 464
— *v.* Hare, 13 Cox, C. C. 174 449
— *v.* Harvey, 8 Cox, C. C. 99 90
— *v.* Haughton, 1 E. & B. 501; 6 Cox, C. C. 101; 22 L. J. M. C. 89; 17 Jur. 455 399
— *v.* Hausmann, 73 J. P. 516 181
— *v.* Hawkins, 2 Car. & K. 823 593
— *v.* Hayward, 6 C. & P. 157 73
— *v.* Heal, 69 J. P. 224 100
— *v.* Hendry, 25 T. L. R. 635 530
— *v.* Heseltine, 12 Cox, C. C. 404 40
— *v.* Hested, 19 Cox, C. C. 16 103
— *v.* Hicklin, L. R. 3 Q. B. 360; 37 L. J. M. C. 89; 16 W. R. 801 352
— *v.* Hill, 2 Den. C. C. 254; Cockle, L. C. 252 . . . 186, 601
— *v.* Hincks, 1 Den. C. C. 84 453
— *v.* Hind, 29 L. J. M. C. 147, 253; 8 Cox, C. C. 300 . . 75
— *v.* Hodgkinson, 64 J. P. 808 178
— *v.* Hodgkiss, L. R. 1 C. C. R. 212 526
— *v.* Hogg, 6 C. & P. 176 280
— *v.* Holloway, 65 J. P. 712 282
— *v.* Holmes, L. R. 1 C. C. R. 334; 41 L. J. M. C. 12; 12 Cox, C. C. 137 . . . . . 34, 121, 198
— *v.* Hook, 27 L. J. M. C. 222 449
— *v.* Horne Tooke, 25 How. St. Tr. 1 46
— *v.* Hubbard, 14 Cox, C. C. 565 73
— *v.* Humphries, 67 J. P. 396 179
— *v.* Hunt, 3 B. & Ald. 566 . . . . . 64, 327, 427
— *v.* Hutchings, 6 Q. B. D. 300 . . . . . 386, 393
— *v.* Hutchinson, 2 B. & C. 608 n. 75
— *v.* Ingham, 5 B. & S. 257 325
— *v.* Jackson, 14 Cr. App. R. 41 515
— *v.* Jarvis, 7 Cox, C. C. 53 . . . . . 35, 116
— *v.* ——, L. R. 1 C. C. R. 96; 37 L. J. M. C. 1; 16 W. R. 111...96, 98
— *v.* Jenkins, R. & R. 492 101
— *v.* ——, L. R. 1 C. C. R. 187; 38 L. J. M. C. 82; 17 W. R. 621...72, 73
— *v.* John, 1 East, P. C. 357 183
— *v.* Johnson, 7 East, 65; 3 Smith, 94; 20 How. St. Tr. 103; 8 R. R. 597 338
— *v.* ——, 2 Car. & K. 354 306
— *v.* Jones, 2 Camp. 131 452
— *v.* ——, 26 T. L. R. 59 180
— *v.* Kams (1900), Times, April 28th 177
— *v.* Katz, 64 J. P. 807 285
— *v.* Kenilworth (Inhabitants of), 7 Q. B. 642; 14 L. J. M. C. 160; 9 Jur. 898; 2 Sess. Cas. 72 315
— *v.* Kennaway, [1917] 1 K. B. 25 116
— *v.* Kiddle, 19 Cox, C. C. 77 78
— *v.* King, [1897] 1 Q. B. 214 475
— *v.* Kingham, 66 J. P. 393 77
— *v.* Kinghorn, [1908] 2 K. B. 949 320
— *v.* Kingston-upon-Hull, 7 B. & C. 611 169
— *v.* Kirkham, 73 J. P. 406; 25 T. L. R. 656 452
— *v.* Kitson, Dears. C. C. 187; 22 L. J. M. C. 118 . . . 317

PAGE
R. *v.* Knight, 20 Cox, C. C. 711; 69 J. P. 108 . . 19, 103, 444
— *v.* Kurasch, [1915] 2 K. B. 749 . . . . . 113, 120
— *v.* Langhorn, 7 How. St. Tr. 446 469
— *v.* Langmead, L. & C. 427 335
— *v.* Laws, 24 T. L. R. 630 530
— *v.* Leach (1909), 2 Cr. App. R. 72 519
— *v.* ——, [1912] A. C. 305 185
— *v.* Leicester (St. Martin's), 2 A. & E. 210 152
— *v.* Leverson, 11 Cox, C. C. 152 203
— *v.* Lillyman, [1896] 2 Q. B. 167; 65 L. J. M. C. 195; 74 L. T. 730; 44 W. R. 654; 60 J. P. 536 . . . 76, 77, 78, 81
— *v.* Llanfaethly, 2 E. & B. 940; Cockle, L. C. 317 . 220, 318, 572
— *v.* Lloyd, 6 C. & P. 393; Cockle, L. C. 187 . . . 98, 99
— *v.* ——, 19 Q. B. D. 213 573
— *v.* Locker, 5 Esp. 107 182
— *v.* London (Inhabitants of), 8 T. R. 379 167
— *v.* —— (Lord Mayor of), 16 Q. B. D. 772 183
— *v.* London Court (Judge of the City of), [1892] 1 Q. B. 273 . 505
— *v.* Long Buckley, 7 East, 45; 3 Smith, 92 340
— *v.* Lovegrove, [1920] 3 K. B. 643 118
— *v.* Lovett, 1 Cr. App. R. 94 530
— *v.* Luckhurst, Dears, C. C. 245; 23 L. J. M. C. 18 . . 96
— *v.* Luffe, 8 East, 193; 9 R. R. 406; Cockle, L. C. 21 . 130
— *v.* Lumley, L. R. 1 C. C. R. 196; 38 L. J. M. C. 86; 11 Cox, C. C. 274; 20 L. T. 454; 17 W. R. 685 . . . . 349, 355
— *v.* McCafferty, 10 Cox, C. C. 603 449
— *v.* McDonell, 73 J. P. 490 . . . . . 453, 467
— *v.* Machen, 14 Q. B. 74 399
— *v.* M'Naghten, 10 Cl. & F. 200. . . . . 38, 42
— *v.* McNair, 25 T. L. R. 228 . . . . . 176, 179
— *v.* Mainwaring, Dears. & B. 139; 26 L. J. M. C. 10; 10 Cox, C. C. 192; 2 Jur. (N.S.) 1236 338
— *v.* Mallory, 13 Q. B. D. 33; 53 L. J. M. C. 134; 50 L. T. 429; 32 W. R. 721; 48 J. P. 487; 15 Cox, C. C. 456 . . 380
— *v.* Malvisi, 73 J. P. 372 530
— *v.* Manning, *The Times*, Oct. 27th, 1849; K. S. C. 447 . . 525
— *v.* Mark (East), 11 Q. B. 877 345
— *v.* Marshall, Car. & M. 147 . . . . . 280, 283
— *v.* ——, 63 J. P. 36 . . . . . 178, 180
— *v.* Martin, 1 Cr. App. R. 33 530
— *v.* ——, L. R. 1 C. C. R. 378 329
— *v.* Mason, 111 L. T. 336 116
— *v.* Mayhew, 6 C. & P. 315 449
— *v.* Mead, 2 B. & C. 605; 4 Dowl. & R. 120; Cockle, L. C. 222 . 75
— *v.* Mean, 69 J. P. 27 112
— *v.* Merceron, 2 Stark. N. P. 366 384
— *v.* Merry, 19 Cox, C. C. 442 78
— *v.* Mir-Anwaruddin, [1917] 1 K. B. 634 228
— *v.* Mitchell, 17 Cox, C. C. 503 75
— *v.* Moore, 2 Den. C. C. 522; 17 Cox, C. C. 458; 61 L. J. M. C. 80; 66 L. T. 125; 40 W. R. 304 . . . 95, 96, 189
— *v.* Mortimer, 99 L. T. 204 530
— *v.* Morton, 2 M. & Rob. 514 98
— *v.* Most, 7 Q. B. D. 244 504
— *v.* Mozley, 1 Moo. C. C. 97 74
— *v.* Mullarkey, 14 Cr. App. R. 44 124
— *v.* Mullins, 3 Cox, C. C. 526 451
— *v.* Murphy, 8 C. & P. 307 456
— *v.* Muscot, 10 Mod. 192 449

PAGE

R. *v.* Nicholas, 2 Car. & K. 246 187
— *v.* Noakes, 5 C. & P. 326 451
— *v.* ———, [1917] 1 K. B. 581 284
— *v.* Norcott, [1917] 1 K. B. 347 . . . . . 76, 79, 80
— *v.* Norfolk County Council, 26 T. L. R. 269 244
— *v.* Norris, 116 L. T. 160 451
— *v.* Norton, [1910] 2 K. B. 496; 102 L. T. 926 . . 86, 87, 371
— *v.* Nuttall, 73 J. P. 30 121
— *v.* Ollis, [1900] 2 Q. B. 758; 69 L. J. Q. B. 918; 83 L. T. 251; 49 W. R. 76 118
— *v.* Osborne (1842), Car. & M. 622 81
— *v.* ———, [1905] 1 K. B. 551 . . . . . 78, 79, 80
— *v.* Osman, 15 Cox, C. C. 1 74
— *v.* Owen, 9 C. & P. 83 453
— *v.* Palmer, Stephen, Hist. Cr. L., III. 389; Report of Trial of William Palmer (Ward & Lock), 1856 . . . . 41, 445
— *v.* Parker, L. & C. 42; 8 Cox, C. C. 465 96
— *v.* ———, L. R. 1 C. C. R. 225 285
— *v.* Parratt, 4 C. & P. 570 97
— *v.* Parsons, L. R. 1 C. C. R. 24 225
— *v.* Partridge, 7 C. & P. 551 98
— *v.* Patram, 2 East, P. C. 782 451
— *v.* Paul and McFarlane, [1920] 2 K. B. 183 . . . . 467, 521
— *v.* Payne, L. R. 1 C. C. R. 349; 41 L. J. M. C. 65; 12 Cox, C. C. 118 453
— *v.* Pearson, 72 J. P. 449 452
— *v.* Peel, 2 F. & F. 21 . . . . . 72, 73
— *v.* Perry, [1909] 2 K. B. 697 . . . . . 71, 72
— *v.* ———, 14 Cr. App. R. 48 530
— *v.* Peters, 16 Q. B. D. 636 131
— *v.* Pike, [1902] 1 K. B. 552; 71 L. J. K. B. 287; 86 L. T. 205; 50 W. R. 672; 9 Manson, 121 196
— *v.* ——, 3 C. & P. 598 76
— *v.* Power, 14 Cr. App. R. 17 520
— *v.* Pratt, 4 F. & F. 315 451
— *v.* Preston, [1909] 1 K. B. 568 180
— *v.* Pulteney, 71 J. P. 101 81
— *v.* Purefoy, Peake, Ev. 64 287
— *v.* Reany, Dears. & Bell, 151; 26 L. J. M. C. 43; 7 Cox, C. C. 209 73
— *v.* Reeve, L. R. 1 C. C. R. 362; 41 L. J. M. C. 92; 12 Cox, C. C. 179 96
— *v.* Reynolds, [1893] 2 Q. B. 75; 62 L. J. M. C. 120; 69 L. T. 321; 42 W. R. 32 338
— *v.* Rhodes, [1899] 1 Q. B. 77; 68 L. J. Q. B. 83; 79 L. T. 360; 47 W. R. 121; 19 Cox, C. C. 182; 62 J. P. 774 34, 113, 178, 521
— *v.* Richards, 5 C. & P. 318 97
— *v.* ———, 1 F. & F. 87 38
— *v.* Richardson, 2 F. & F. 343 117
— *v.* Rickard, 119 L. T. 192 45
— *v.* Rigg, 4 F. & F. 1085 287
— *v.* Riley, 18 Q. B. D. 481; 56 L. J. M. C. 52; 56 L. T. 371; 35 W. R. 382; 16 Cox, C. C. 191 . . . . 34, 122, 198
— *v.* Rishworth, 2 Q. B. 487; 11 L. J. M. C. 34; 1 G. & D. 597 . 301
— *v.* Robinson, 4 F. & F. 43 . . . . . 55, 451
— *v.* Rodley, [1913] 3 K. B. 468 113
— *v.* Rogers, 111 L. T. 1115 51
— *v.* Rose, 67 L. J. Q. B. 289; 78 L. T. 119; 18 Cox, C. C. 717 . 98, 104

PAGE
R. *v.* Rouse, [1904] 1 K. B. 184; 73 L. J. K. B. 60; 89 L. T. 677; 52 W. R. 236 180
— *v.* Rowe, R. & R. 153 97
— *v.* Rowland, [1910] 1 K. B. 458 . . . . . 35, 117
— *v.* Rowlands, 62 J. P. 459 77
— *v.* Rowley, 1 Moo. C. C. 111 91
— *v.* Rowton, 34 L. J. M. C. 57; L. & C. 520; 10 Cox, C. C. 25; 11 L. T. 745; 13 W. R. 436; 11 Jur. (N.S.) 325; Cockle, L. C. 109...120
— *v.* Rutter, 25 T. L. R. 73 528
— *v.* Rymers, 3 Car. & K. 326 527
— *v.* Sadler, 4 C. & P. 218 515
— *v.* St. Martin's, Leicester, 2 A. & E. 210 152
— *v.* St. Mary Magdalen, 2 E. & B. 809; 23 L. J. M. C. 1; 17 Jur. 1075 337
— *v.* Sanders, [1919] 1 K. B. 550 524
— *v.* Sansome, 1 Den. C. C. 545 100
— *v.* Scaife, 17 Q. B. 238; 2 Den. C. C. 281; 5 Cox, C. C. 243; 20 L. J. M. C. 229; 15 Jur. 607; Cockle, L. C. 376...89, 280
— *v.* ——, 1 Moo. & R. 551 75
— *v.* ——, 2 Den. C. C. 281 284
— *v.* Scammonden, 3 T. R. 474; 1 R. R. 752 167
— *v.* Schmidt, 6 Cr. App. R. 288 530
— *v.* Sexton, Russell on Crimes, 2180 99
— *v.* Shaw, 6 C. & P. 372 99
— *v.* Sheean, 72 J. P. 232; 24 T. L. R. 459 180
— *v.* Shellaker, [1914] 1 K. B. 414 118
— *v.* Shellard, 9 C. & P. 277 285
— *v.* Silverlock, [1894] 2 Q. B. 766; 63 L. J. M. C. 233; 43 W. R. 14; 10 R. 431; 58 J. P. 788 . . . . . 40, 45
— *v.* Simons, 6 C. & P. 540 201
— *v.* Slaney, 5 C. & P. 213 . . . . . 45, 238
— *v.* Sleeman, Dears. C. C. 269 . . . . . 96, 99
— *v.* Smith, L. & C. 607; 10 Cox, C. C. 82; 34 L. J. M. C. 153 . 74
— *v.* ——, L. R. 1 C. C. R. 266 509
— *v.* ——, 65 J. P. 426 75
— *v.* ——, 18 Cox, C. C. 470 . . . . . 54, 84, 101, 380
— *v.* ——, [1910] 1 K. B. 17 506
— *v.* ——, [1915] W. N. 309; 84 L. J. K. B. 2153...111, 178, 207, 521
— *v.* Smithies, 5 C. & P. 332 201
— *v.* Spilsbury, 7 C. & P. 187 99
— *v.* Stamford (Mayor of), 6 Q. B. 433 337
— *v.* Stoddart, 73 J. P. 348 . . . . . 139, 179
— *v.* Stoke-upon-Trent (Inhabitants of), 5 Q. B. 303; D. & M. 357; 13 L. J. Q. B. 41; 8 Jur. 34 . . . . . 165, 167
— *v.* Stonehouse, 10 Q. B. 234 338
— *v.* Strand Board of Works, 4 B. & S. 526; 33 L. J. M. C. 33; 12 W. R. 826 358
— *v.* Stripp, Dears. C. C. 648; 7 Cox, C. C. 97 100
— *v.* Stuart, 2 T. L. R. 144 572
— *v.* Stubbs, Dears. C. C. 555; 25 L. J. M. C. 16; 1 Jur. (N.S.) 1115 452
— *v.* Sullivan, 16 Cox, C. C. 347 102
— *v.* Sutton, 8 A. & E. 516 295
— *v.* Swinnerton, Car. & M. 593 101
— *v.* Tate, [1908] 2 K. B. 680 . . . . . 55, 451, 452, 521
— *v.* Taylor, 8 C. & P. 733 97
— *v.* Thanet (Earl of), 27 How. St. Tr. 845 90
— *v.* Thistlewood, 33 How. St. Tr. 681 591
— *v.* Thomas, 6 C. & P. 353 98

PAGE
R. *v.* Thomas, 11 Cox, C. C. 535 140
— *v.* Thompson, [1910] 1 K. B. 640 84
— *v.* ——, L. R. 1 C. C. R. 377; 41 L. J. M. C. 112; 20 W. R. 728 182
— *v.* ——, [1893] 2 Q. B. 12; 12 L. J. M. C. 93; 69 L. T. 22; 41 W. R. 525; 57 J. P. 312 . . . 95, 97
— *v.* ——, [1918] A. C. 221 119
— *v.* Thomson, 64 J. P. 456 113
— *v.* Thornhill, 8 C. & P. 575 371
— *v.* Threlfall, 111 L. T. 168 449
— *v.* Tissington, 1 Cox, C. C. 48 121
— *v.* Tolson, 23 Q. B. D. 168 349
— *v.* Tooke (Horne), 25 How. St. Tr. 1 46
— *v.* Trowbridge, 7 B. & C. 252 373
— *v.* Turner, 5 M. & S. 206; Cockle, L. C. 130 . . . 140, 422
— *v.* ——, 1 Moo, C. C. 347 380
— *v.* ——, [1910] 1 K. B. 346; 26 T. L. R. 112 45, 121, 132, 219, 519, 527, 595
— *v.* Twiss, [1918] 2 K. B. 853 119
— *v.* Upchurch, 1 Moo. C. C. 465 97
— *v.* Vantandillo, 4 M. & S. 73 352
— *v.* Vasey and Lally, 93 L. T. 671 504
— *v.* Vaughan, 13 How. St. Tr. 485, 517 . . . . 325, 449
— *v.* Verelst, 3 Camp. 432; 14 R. R. 775 . . . . 336, 337
— *v.* Verney, 73 J. P. 288 176
— *v.* Voisin, [1918] 1 K. B. 531 104
— *v.* Walford, 71 J. P. 215. 112
— *v.* Walkley, 6 C. & P. 175 98
— *v.* Waller, [1910] 1 K. B. 364 . . . . . 121, 519
— *v.* Warren, 25 T. L. R. 623 177
— *v.* Warringham, 2 Den. C. C. 447 . . . . . 97, 98
— *v.* Warwickshall, 1 Leach, C. C. 263 101
— *v.* Watson, 2 Stark. 128; 32 How. St. Tr. 74 313
— *v.* Watt, 20 Cox, C. C. 852 102
— *v.* Watts, L. & C. 339; 33 L. J. M. C. 63; 9 Cox, C. C. 395; 9 L. T. 453; 12 W. R. 112 . . . . . 282, 285
— *v.* Weaver, L. R. 2 C. C. R. 85; 43 L. J. M. C. 13; 12 Cox, C. C. 527 227
— *v.* ——, 1 Cr. App. R. 12 . . . . . 527, 531
— *v.* Wellings, 3 Q. B. D. 426; 47 L. J. M. C. 100; 38 L. T. 652; 26 W. R. 592 284
— *v.* Westfall, 107 L. T. 463 178
— *v.* Whalley, 2 Car. & K. 376 329
— *v.* Wheatland, 8 C. & P. 238 449
— *v.* Whiston, 4 A. & E. 611 336
— *v.* Whitehead, L. R. 1 C. C. R. 33; 35 L. J. M. C. 186; 10 Cox, C. C. 34; 13 L. T. 489; 14 W. R. 677 . . . 186, 601
— *v.* Whiteman, 73 J. P. 102 121
— *v.* Whitmarsh, 62 J. P. 680 74
— *v.* Wild, 1 Moo. C. C. 452 99
— *v.* Williams, 7 C. & P. 320 187
— *v.* Willis, [1916] 1 K. B. 933 452
— *v.* Willshire, 6 Q. B. D. 366 . . . . . 355, 361
— *v.* Wilshaw, Car. & M. 145 287
— *v.* Wilson, 3 F. & F. 119 343
— *v.* Windsor, 7 B. & S. 360 453
— *v.* Wink, 6 C. & P. 397 81
— *v.* Wood, [1920] 2 K. B. 179 178
— *v.* Woodcock, 1 Leach, C. C. 500; Cockle, L. C. 223...71, 73, 75, 183
— *v.* Woodland (The Inhabitants of), 2 East, 164 . . . 507

PAGE
R. *v.* Wright, 2 F. & F. 320 526
— *v.* Wyatt, [1904] 1 K. B. 188; 73 L. J. K. B. 15; 52 W. R. 285; 68 J. P. 31 112
— *v.* Yates, Car. & M. 132 449
— *v.* Yewins, 2 Camp. 638 469
Raffles *v.* Wichelhaus, 2 H. & C. 906 487
Railways, Commissioner for *v.* Brown, 13 App. Cas. 133 . . 610
Rambert *v.* Cohen, 4 Esp. 213; 6 R. R. 854 258
Ramsbotham *v.* Senior, L. R. 8 Eq. 575; 17 W. R. 1057 . . 208
Ramsden *v.* Dyson, L. R. 1 H. L. 129; 12 Jur. (N.S.) 506; 14 W. R. 926 413
Rancliff *v.* Perkins, 6 Dow, 202 246
Rapp *v.* Latham, 2 B. & Ald. 795 377
Rasbotham *v.* Shropshire Union, &c., Co., 24 Ch. D. 110 . 367, 544
Rassam *v.* Budge, [1893] 1 Q. B. 571 31
Ratcliff *v.* Ratcliff, 1 Sw. & T. 467 228
Rattenberry *v.* Monro, 103 L. T. 560 . . . . . 540, 549
Raven, *In re*, [1915] 1 Ch. 673 491
Rawlins *v.* Richards, 28 Beav. 370 277
Rawlinson *v.* Miller, L. R. 1 Eq. 52 356
——— *v.* Scholes, 79 L. T. 350 454
Rawson *v.* Haigh, 2 Bing. 99; Cockle, L. C, 68 64
Raymond *v.* Tapson, 22 Ch. D. 430; 31 W. R. 394 571
Rayner *v.* Rayner, [1904] 1 Ch. 176; 73 L. J. Ch. 111; 89 L. T. 681; 52 W. R. 273 494
Read *v.* Bishop of Lincoln, [1892] A. C. 644; 62 L. J. P. C. 1; 67 L. T. 128; 56 J. P. 725 299
——— *v.* Price, [1909] 2 K. B. 724 . . . . . 156, 310
Reay's Estate, *In re*, 1 Jur. (N.S.) 222 240
Redfern *v.* Redfern, [1891] P. 139; 60 L. J. P. 9 . . . 198, 200
Redgrave *v.* Hurd, 20 Ch. D. 1; 51 L. J. Ch. 113; 45 L. T. 485; 30 W. R. 251 . . . . . 139, 405
Reed *v.* Jackson, 1 East, 355 . . . . . 60, 292
Rees, In the Goods of, 34 L. J. P. M. & A. 56 339
——— *v.* Williams, 1 De G. & Sm. 314 243
Reeve *v.* Whitmore, 4 De G., J. & Sm. 1 376
Reffell *v.* Morton, 70 J. P. 347 450
——— *v.* Reffell, L. R. 1 P. & D. 139; 35 L. J. P. & M. 121 . 168
Reid *v.* Hoskins, 6 E. & B. 953 378
Republic of Costa Rica *v.* Erlanger, L. R. 19 Eq. 33 . . 554, 564
——— *v.* ———, 3 Ch. D. 62 506
Reynolds, *Ex parte*, 20 Ch. D. 294; 51 L. J. Ch. 756; 46 L. T. 508; 30 W. R. 651; 46 J. P. 533 193
Rhodes, *In re*, 36 Ch. D. 586 355
Ricardo *v.* Garcias, 12 Cl. & F. 368; 9 Jur. 1019 399
Rice, *In re*, 32 Ch. D. 35; 55 L. J. Ch. 799; 54 L. T. 589; 34 W. R. 747 240
—— *v.* Swansea Vale, 26 T. L. R. 276 146
Richards *v.* Bassett, 10 B. & C. 657 294
——— *v.* Gellatly, L. R. 7 C. P. 127; 26 L. T. 435; 20 W. R. 630 375
——— *v.* Hough, 51 L. J. Q. B. 361; 30 W. R. 676 587
——— *v.* McBride, 8 Q. B. D. 119 . . . . . 503, 507
——— *v.* Morgan, 4 B. & S. 641 375
Richardson *v.* Watson, 4 B. & Ad. 787; 1 N. & M. 567; 2 L. J. K. B. 134 480
Riches *v.* Riches, 35 T. L. R. 141 455
Rickards *v.* Murdock, 10 B. & C. 527 42
Ricketts *v.* Turquand, 1 H. L. Cas. 472 494

PAGE
Rickmann *v.* Thierry, 14 R. P. C. 105 612
Right *v.* Badnall, 2 B. & Ad. 278 402
—— *v.* Price, Doug. 241 242
Rippiner *v.* Wright, 2 B. & Ald. 478 310
River Steamer Co., *In re*, L. R. 6 Ch. 822; 25 L. T. 319; 19 W. R. 1130 253
Rivers *v.* Adams, 3 Ex. D. 361 348
—— *v.* Griffiths, 5 B. & Ald. 630 605
Roberts *v.* Ogilby, 9 Price, 269 411
——— *v.* Oppenheim, 26 Ch. D. 724; 50 L. T. 729; 32 W. R. 390 549
——— *v.* Security Co., [1897] 1 Q. B. 111; 66 L. J. Q. B. 119; 75 L. T. 531; 45 W. R. 214 403
Robertson *v.* Jackson, 15 L. J. C. P. 28 42
Robin, The, [1892] P. 95 42
Robinson *v.* Davies, 5 Q. B. D. 26; 49 L. J. Q. B. 218; 28 W. R. 255 . . . . . 124, 587
——— *v.* Duleep Singh, 11 Ch. D. 798; 48 L. J. Ch. 758; 27 W. R. 21 398
——— *v.* French, 4 East, 130 488
——— *v.* Gregory, [1905] 1 K. B. 534 226
——— *v.* Robinson, 1 S. & T. 362; 27 L. J. P. & M. 91; 5 Jur. (N.S.) 392 375
——— *v.* Rudkins, 26 L. J. Ex. 56 161
——— *v.* Smith, [1915] 1 K. B. 711 613
——— *v.* Vernon (Lord), 7 C. B. (N.S.) 231; 29 L. J. C. P. 310...167, 259
——— *v.* Yarrow, 7 Taunt. 455 411
Robson *v.* Kent, 5 Esp. 552 318
Rochefoucauld *v.* Boustead, 65 L. J. Ch. 794; 74 L. T. 783 . . 205
——— *v.* ———, [1897] 1 Ch. 196; 66 L. J. Ch. 74; 75 L. T. 502 557
Roden *v.* London Small Arms Co., 46 L. J. Q. B. 213; 35 L. T. 505; 25 W. R. 269 487
Roe *v.* Kemmis, 9 Cl. & F. 749 . . . . . 267, 270, 383
—— *v.* Mutual Loan Fund, 19 Q. B. D. 347; 56 L. J. Q. B. 541; 35 W. R. 723 407
—— *v.* New York Press, 75 L. T. Jo. 31 558
—— *v.* Rawlings, 7 East, 279; 3 Smith, 254 . . . . 246, 301
Rogers *v.* Allen, 1 Camp. 309; 10 R. R. 689 247
——— *v.* Custance, 2 M. & Rob. 179 593
——— *v.* Hawken, 67 L. J. Q. B. 526; 78 L. T. 655; 62 J. P. 279 104
——— *v.* Lambert, 24 Q. B. D. 573; 59 L. J. Q. B. 259; 62 L. T. 664; 38 W. R. 542 . . . . . 410, 539
——— *v.* Wood, 2 B. & Ad. 245 295
Rohmann *v.* Rohmann, 25 T. L. R. 78 228
Romford Canal Co, *In re*, 24 Ch. D. 85 416
Ross *v.* Hunter, 4 T. R. 38 349
—— *v.* Woodford, [1894] 1 Ch. 38; 63 L. J. Ch. 191; 70 L. T. 22; 42 W. R. 188 584
Rothes (Countess of) *v.* Kirkcaldy, etc., Commissioners, 7 App. Cas. 694. 504
Rouch *v.* Great Western Rail. Co., 1 Q. B. 51 64
Rousillon *v.* Rousillon, 14 Ch. D. 351; 49 L. J. Ch. 339; 42 L. T. 679; 28 W. R. 623; 44 J. P. 663 144
Rowcliffe *v.* Leigh, 6 Ch. D. 256 564
Rowe *v.* Brenton, 8 B. & C. 737 . . . . . 58, 110
Rowland *v.* Mitchell, 13 R. P. C. 457 374
Rowley *v.* London and North Western Rail. Co., L. R. 8 Ex. 221 . 42
Royal Warrant Holders' Association *v.* Edward Deane & Boal, Ltd., [1912] 1 Ch. 10 327

PAGE
Ruben and Another *v.* Great Fingall Consolidated, [1906] A. C. 439 415
Rumball *v.* Metropolitan Bank, 2 Q. B. D. 194; 46 L. J. Q. B. 346; 36 L. T. 240; 25 W. R. 366 417
Rushton's Case, 1 Leach, C. C. 408 186
Russell *v.* Jackson, 9 Hare, 392; 21 L. J. Ch. 146; 15 Jur. 117 . 207
Ruther *v.* Harris, 1 Ex. D. 97 504
Ryder *v.* Wombwell, L. R. 4 Ex. 32; 38 L. J. Ex. 8; 17 W. R. 167 . . . . . 601, 603
Ryland *v.* Jackson and Brodie, 18 T. L. R. 574 600

S.

S. *v.* S., [1907] P. 224 174
Saccharin Corporation *v.* Anglo, etc., Works, [1901] 1 Ch. 414 . 542
——— *v.* Wild, [1903] 1 Ch. 410; 20 R. P. C. 243; 72 L. J. Ch. 270; 88 L. T. 101 613
St. Nazaire Co., *In re*, 12 Ch. D. 88 536
St. Paul, The, [1908] P. 320 93
Salmon *v.* Duncombe, 11 App. Cas. 627 504
Salomon *v.* Hole, 53 W. R. 588 566
Sanders *v.* Karnell, 1 F. & F. 356 384
——— *v.* St. Neot's Union, 8 Q. B. 810 155
——— *v.* Sanders, 19 Ch. D. 373 613
Sanderson *v.* Collman, 4 Man. & G. 209 411
Sandilands, *In re*, L. R. 6 C. P. 411 . . . . . 337, 339
——— *v.* Marsh, 2 B. & Ald. 673 382
Saull *v.* Browne, L. R. 9 Ch. 364; 43 L. J. Ch. 568; 22 W. R. 427 . 542
Saunders *v.* Wiel, [1892] 2 Q. B. 18, 321; 9 R. P. C. 459; 40 W. R. 594 . . . . . 192, 547
Saunderson *v.* Baron von Radeck, 119 L. T. Jo. 33 (H. L.) . . 545
Savage *v.* Foster, 9 Mod. 35 406
Saxby *v.* Easterbrook, 3 C. P. D. 339 604
Sayer *v.* Glossop, 2 Ex. 409; 17 L. J. Ex. 300 227
Scaife *v.* Johnson, 3 B. & C. 421 377
——— *v.* Kemp, [1892] 2 Q. B. 319; 61 L. J. Q. B. 515; 66 L. T. 589 539
Scarf *v.* Jardine, 7 App. Cas. 345; 51 L. J. Q. B. 711; 30 W. R. 893 417
Scharrer, *In re*, *Ex parte* Tilly, 20 Q. B. D. 518 573
Schibsby *v.* Westenholz, L. R. 6 Q. B. 155; 40 L. J. Q. B. 73; 24 L. T. 93; 89 W. R. 587 401
Scholfield *v.* Londesborough (Earl of), [1896] A. C. 514; 65 L. J. Q. B. 593; 75 L. T. 254; 45 W. R. 124 412
Schwalbe, The, Swab. 521 93
Schweppes, Ltd. *v.* Gibbens, [1905] W. N. 28 609
Scott *v.* Attorney-General, 11 P. D. 128 390
——— *v.* Jones, 4 Taunt. 865 594
——— *v.* London Dock Co., 3 H. & C. 596; 34 L. J. Ex. 220; 13 L. T. 148 147
——— *v.* Sampson, 8 Q. B. D. 491; 51 L. J. Q. B. 380; 46 L. T. 412; 30 W. R. 541; 46 J. P. 408 . 30, 115, 123, 427, 443, 461, 470
——— *v.* Shearman, 2 W. Bl. 977 390
Seal *v.* Kingston, [1908] 2 K. B. 579 560
Seaman *v.* Netherclift, 2 C. P. D. 53 471
Seed *v.* Higgins, 8 H. L. Cas. 550; 30 L. J. Q. B. 314; 6 Jur. (N.S.) 1264 44
Serjeant *v.* Nash, Field & Co., [1903] 2 K. B. 304 409
Seton *v.* Lafone, 19 Q. B. D. 68; 56 L. J. Q. B. 415; 57 L. T. 547 406

PAGE
Sharp *v.* Jackson, [1899] A. C. 419 . . . . . 91, 197
Sharpe *v.* Foy, L. R. 4 Ch. 35 405
——— *v.* Lamb, 11 A. & E. 805; 3 P. & D. 454; 4 Jur. 965 . 323, 368, 590
Sharples *v.* Adams, 11 W. R. 456 436
——— *v.* Rickard, 2 H. & N. 57 259
Sharpness New Docks *v.* Att.-Gen., [1915] A. C. 654 . . . 502
Shaw *v.* Herefordshire County Council, [1899] 2 Q. B. 282; 68 L. J. Q. B. 857; 81 L. T. 208; 63 J. P. 659 . 392, 393
——— *v.* Port Philip Colonial Gold Mining Co., 13 Q. B. D. 103; 53 L. J. Q. B. 369; 50 L. T. 685; 32 W. R. 771 . . 415
——— *v.* Smith, 18 Q. B. D. 193 550
Shaw and Ronaldson, *In re*, [1892] 1 Q. B. 91; 61 L. J. Q. B. 141 583
Shedden *v.* Att.-Gen., 2 Sw. & Tr. 170; 30 L. J. P. & M. 217 . 292
Sheffield Rail. Co. *v.* Woodcock, 7 M. & W. 574; 2 Rail. Cas. 522; 11 L. J. Ex. 26 414
Shepheard *v.* Bray, [1906] 2 Ch. 235 89
Shepherd *v.* Shorthose, 1 Str. 412 223
Shires *v.* Glascock, 2 Salk. 688 242
Shirley *v.* Ferrers (Earl), 3 P. Wms. 77 584
Shoe Machinery Co. *v.* Cutlan, 13 R. P. C. 141; (C.A.) [1896] 1 Ch. 108 398
Shore *v.* Wilson, 9 Cl. & F. 355 . . . . . 479, 480
Shrewsbury Peerage Case, 7 H. L. Cas. 1 . . . . . 299, 300
Sichel *v.* Lambert, 15 C. B. (N.S.) 781; 33 L. J. C. P. 137; 10 Jur. (N.S.) 617; 12 W. R. 312 338
Sillick *v.* Booth, 1 Y. & C. 117 357
Sills *v.* Brown, 9 C. & P. 601 287
Simm *v.* Anglo-American Telegraph Co., 5 Q. B. D. 188; 49 L. J. Q. B. 392; 42 L. T. 37; 28 W. R. 290; 44 J. P. 280 . 415
Simpson *v.* Att.-Gen., [1904] A. C. 476 347
——— *v.* Barnes, 33 Beav. 483 251
——— *v.* Fogo, 1 J. & H. 18; 1 H. & M. 195; 9 Jur. (N.S.) 403; 32 L. J. Ch. 249; 8 L. T. 61; 11 W. R. 418 . . 400
——— *v.* Margitson, 11 Q. B. 23; 17 L. J. Q. B. 81; 12 Jur. 155 . . . . . 478, 481
——— *v.* Teignmouth and Shaldon Bridge Co., [1903] 1 K. B. 405 507
Sinclair *v.* Stevenson, 1 C. & P. 585; 2 Bing. 514 153
Singleton *v.* Barrett, 2 C. & J. 368; 2 Tyr. 409; 1 L. J. Ex. 134 . 169
Slade *v.* Tucker, 14 Ch. D. 824; 49 L. J. Ch. 644; 43 L. T. 49; 28 W. R. 807 . . . . . 208, 556
Slatterie *v.* Pooley, 6 M. & W. 664; 10 L. J. Ex. 8; 1 H. & W. 16; 4 Jur. 1038; Cockle, L. C. 180 . . . . . 319, 374, 384
Slinn, In the Goods of, 15 P. D. 156; 59 L. J. P. 82; 63 L. T. 229; 39 W. R. 175 487
Sloane *v.* Britain Steamship Co., [1897] 1 Q. B. 185; 66 L. J. Q. B. 72; 75 L. T. 542; 45 W. R. 203 . . . . . 251, 548, 555
Sly *v.* Dredge, 2 P. D. 91; 46 L. J. P. D. & A. 63; 25 W. R. 463 . 270
Smart *v.* Prujean, 6 Ves. 565 498
Smethurst *v.* Taylor, 12 M. & W. 545 380
Smith *v.* Andrews, [1891] 2 Ch. 678; 65 L. T. 175 . . . 247
——— *v.* Barnes, L. R. 1 Eq. 65 554
——— *v.* Blakey, L. R. 2 Q. B. 326; 8 B. & S. 164; 36 L. J. Q. B. 156; 15 W. R. 492 . . . . . 269, 276
——— *v.* Brownlow (Earl), L. R. 9 Eq. 241; 21 L. T. 739; 18 W. R. 271 298
——— *v.* Camelford (Lord), 2 Ves. 716 413
——— *v.* Daniell, L. R. 18 Eq. 649; 44 L. J. Ch. 189; 30 L. T. 752 250

PAGE
Smith *v.* Fell, 2 Curteis, 667 204
——— *v.* Harris, 48 L. T. 868 548
——— *v.* Henley, 1 Phil. 391 310
——— *v.* Huson, 1 Phillimore, 287 338
——— *v.* Jeffryes, 15 M. & W. 561; 15 L. J. Ex. 325 . . . 160
——— *v.* Kay, 7 H. L. Cas. 750 405
——— *v.* Kynnersley, [1903] 1 K. B. 788 507
——— *v.* Lister, 64 L. J. Q. B. 154; 72 L. T. 20 . . . 233, 297
——— *v.* Prosser, [1907] 2 K. B. 735 412
——— *v.* Thompson, 8 C. B. 44; 18 L. J. C. P. 314 . . . 485
——— *v.* Wheatcroft, 9 Ch. D. 223; 47 L. J. Ch. 745; 26 W. R. 42 163
——— *v.* Whittingham, 6 C. & P. 78 381
——— *v.* Wilkins, 6 C. & P. 180 56
——— *v.* Wilson, 3 B. & Ad. 728 . . . . . 478, 481
——— *v.* Young, 1 Camp. 439 592
——— *v.* Knight & Co., *In re*, L. R. 8 Eq. 23; 17 W. R. 758 . 585
Smithies *v.* National Association of Operative Plasterers, [1909] 1 K. B. 310 506
Smyth *v.* Smyth, 8 Ch. D. 561 477
Société Maritime *v.* Venus Steam Shipping Co., 9 Com. Cas. 289 535
Solicitor, *In re* A, 25 Q. B. D. 17; 38 W. R. 507, 533 . . . 197
Sourdis *v.* Keyser, 18 T. L. R. 416 358
South African Republic *v.* La Compagnie Franco-Belge, [1898] 1 Ch. 190; 67 L. J. Ch. 92; 77 L. T. 555; 46 W. R. 151 . . . 547
South American and Mexican Co., *In re*, [1895] 1 Ch. 37; 64 L. J. Ch. 189; 71 L. T. 594; 43 W. R. 131; 12 R. 1 393
South Eastern Rail. Co. *v.* Railway Commissioners, 50 L. J. Q. B. 203 503
South of Ireland Colliery Co. *v.* Waddle, L. R. 4 C. P. 617; 38 L. J. C. P. 338 155
South Staffordshire Tramways Co. *v.* Ebbsmith, [1895] 2 Q. B. 669; 65 L. J. Q. B. 96; 73 L. T. 495 . . . . . 321, 322
Southey *v.* Nash, 7 C. & P. 632 456
Southwark Water Co. *v.* Quick, 3 Q. B. D. 315; 47 L. J. Q. B. 258; 26 W. R. 341 . . . . . 556, 557
Soward *v.* Leggatt, 7 C. & P. 613; Cockle, L. C. 126 . . . 136
Spargo *v.* Brown, 9 B. & C. 935 . . . . . 55, 268
Speake *v.* Hughes, [1904] 1 K. B. 138 . . . . . 600, 604
Spiers & Pond, Ltd. *v.* John Bull, Ltd., 85 L. J. K. B. 992 . . 539
Spilsbury *v.* Burdett, 10 Cl. & F. 840 339
Spittle *v.* Walton, L. R. 11 Eq. 420; 40 L. J. Ch. 368; 24 L. T. 18; 19 W. R. 405 186
Spokes *v.* Grosvenor Hotel Co., [1897] 2 Q. B. 124, 130; 66 L. J. Q. B. 598; 76 L. T. 677; 45 W. R. 545 . . . 193, 550, 558
Spooner *v.* Godfrey, Times Newspaper, Oct, 16th, 1908 . . . 448
Squire, *Ex parte*, L. R. 4 Ch. 47; 17 W. R. 40 257
——— *v.* West Australian Mortgage, etc., Co., [1896] A. C. 257 . 406
Stace *v.* Griffith, L. R. 2 P. C. 420 . . . . . 235, 316, 603
Stainer *v.* Droitwich, 1 Salk. 281 299
Stanley *v.* Stanley, 2 J. & H. 491; 10 W. R. 857 495
——— *v.* White, 14 East, 332 . . . . . 33, 108, 109
Stannus *v.* Finlay, 8 Ir. R. C. L. 264 604
Stanton *v.* Percival, 24 L. J. Ch. 309 380
Stapleton *v.* Crofts, 18 Q. B. 367; 21 L. J. Q. B. 246 . . . 181
Stapylton *v.* Clough, 2 E. & B. 933; 23 L. J. Q. B. 5; 2 C. L. R. 266; 18 Jur. 60 278
Steel *v.* Houghton, 1 H. Bl. 60 347
Steele *v.* Brannan, L. R. 7 C. P. 261 352
——— *v.* Savory, 8 T. L. R. 94 571

PAGE
Steer, *In re*, 3 H. & N. 594 53
Stein *v.* Tabor, 31 L. T. 444 540
Steinkeller *v.* Newton, 9 C. & P. 315 153
Stephen *v.* Gwenap, 1 Moo. & R. 120 268
Stephenson *v.* River Tyne Commissioners, 17 W. R. 590 . . 39
Steuart *v.* Balkis Co., 53 L. J. Ch. 791; 50 L. T. 479; 32 W. R. 676 588
——— *v.* Gladstone, 7 Ch. D. 394; 47 L. J. Ch. 154; 37 L. T. 575; 26 W. R. 277 585
Steward *v.* North Metropolitan Tramways Co., 16 Q. B. D. 556; 55 L. J. Q. B. 157; 54 L. T. 35; 34 W. R. 316; 50 J. P. 324 606
Stewart *v.* Eddowes, L. R. 9 C. P. 311; 33 L. J. C. P. 204; 22 W. R. 534 . . . . . 162, 489
Stockdale *v.* Hansard, 7 C. & P. 731 . . . . . 130, 132
——— *v.* ———, 9 A. & E. 905 131
Stocken *v.* Collin, 7 M. & W. 515; 9 C. & P. 653; 10 L. J. Ex. 227 129
Stonehouse *v.* Evelyn, 3 P. Wms. 113 241
Storey *v.* Lord Lennox, 1 Keen, 341 540
Stott *v.* Fairlamb, 53 L. J. Q. B. 47; 49 L. T. 525 . . . 167
Stowe *v.* Querner, L. R. 5 Ex. 155; 39 L. J. Ex. 60; 22 L. T. 29; 18 W. R. 466 . . . . . 319, 592, 601
Stowel *v.* Lord Zouch, Plowd. 369 504
Stowell *v.* Robinson, 3 Bing. N. C. 928; 6 L. J. C. P. 326; 5 Scott, 196 168
Strachan, *In re*, [1895] 1 Ch. 439; 64 L. J. Ch. 321; 72 L. T. 175; 43 W. R. 369; 59 J. P. 102; 60 J. P. 36; 12 R. 148; 11 T. L. R. 215 . . . . . 556, 561
Street *v.* Licensed Victuallers' Society, 22 W. R. 553 . . . 604
Strickland *v.* Ward, 7 T. R. 633 342
Stringer *v.* Gardiner, 27 Beav. 35 . . . . . 492, 493
Stroud, *In re*, 8 C. B. 502; 16 L. J. C. P. 117 480
Stroughill *v.* Buck, 14 Q. B. 781; 14 Jur. 741 402
Strutt *v.* Bovingdon, 5 Esp. 56 279
Sturge *v.* Buchanan, 10 A. & E. 598; 2 P. & D. 573; 2 M. & Rob. 90 593
Sturla *v.* Freccia, 5 App. Cas. 623; 50 L. J. Ch. 94; 29 W. R. 220...212, 213, 216, 232, 233, 303
Suffell *v.* Bank of England, 9 Q. B. D. 555; 51 L. J. Q. B. 401; 47 L. T. 146; 30 W. R. 932; 46 J. P. 500 . . . . . 342, 490
Sugden *v.* St. Leonards (Lord), 1 P. D. 154; 45 L. J. P. D. & A. 1; 34 L. T. 369; 24 W. R. 479 . . . . . 310, 340, 495
Summer *v.* Brown, 25 T. L. R. 745 443
Sumner, *In re*, 30 L. T. 377; 22 W. R. 639 357
Suse *v.* Pompe, 8 C. B. (N.S.) 538; 30 L. J. C. P. 75; Jur. (N.S.) 166; 9 W. R. 15 483
Sussex Peerage Case, 11 Cl. & F. 85; 8 Jur. 793 . . 40, 49, 50, 71, 266, 269, 302, 504
Suter *v.* Burrell, 2 H. & N. 867; 27 L. J. Ex. 193 592
Sutro & Co. and Heilbut, Symons & Co., *In re*, [1917] 2 K. B. 348 480
Swansea Rail. Co. *v.* Budd, L. R. 2 Eq. 274; 35 L. J. Ch. 631; 14 W. R. 663; 12 Jur. (N.S.) 561 564
Sweet, In the Goods of, [1891] P. 400; 61 L. J. P. & D. 15 . . 242
Swinfen *v.* Chelmsford, 5 H. & N. 890 370
——— *v.* Swinfen, 18 C. B. 485 370
Sykes *v.* Dunbar, 2 Selw. N. P. (1869 ed.) 1015 235
——— *v.* Haig, 44 L. T. 57 468
Symons *v.* Leaker, 15 Q. B. D. 629 504

T.

PAGE

Tadman *v.* Henman, [1893] 2 Q. B. 168 401
Tait *v.* Beggs, [1905] 2 Ir. R. 525 615
Talbot *v.* Hodson, 7 Taunt. 251; 2 Marsh. 527 243
Taplin *v.* Atty, 3 Bing. 164; 10 Moore, 564 591
Tatam *v.* Haslar, 23 Q. B. D. 345 . . . . . 360, 407
Tate *v.* Williamson, L. R. 1 Eq. 528; 14 W. R. 449 350
Tatham *v.* Wright, 2 Russ. & M. 1 241
Taylor *v.* Batten, 4 Q. B. D. 85 552
——— *v.* Forster, 2 C. & P. 195 204
——— *v.* Hawkins, 16 Q. B. 308 148
——— *v.* Parry, 1 Man. & G. 604; 1 Scott, N. R. 576 . . 57, 107
——— *v.* Rundell, Cr. & Ph. 104 559
——— *v.* Willans, 2 B. & Ad. 845; 4 M. & P. 59 370
——— *v.* Witham, 3 Ch. D. 605; 45 L. J. Ch. 798; Cockle, L. C. 198 . . . . . 269, 271, 272, 420, 428
Temperley *v.* Willett, 6 E. & B. 380 564
Tennant *v.* Hamilton, 7 Cl. & F. 122; Macl. & R. 821. . . . 465
Tetley *v.* Easton, 18 C. B. 643 . . . . . 252, 541
Thomas, In the Goods of, 41 L. J. P. & M. 32; 25 L. T. 509; 20 W. R. 149 267
——— (Jane), In the Goods of, 1 Sw. & Tr. 255 339
——— *v.* Bradbury, Agnew & Co., [1906] 2 K. B. 627 . . 604
——— *v.* David, 7 C. & P. 350; Cockle, L. C. 287 . . . 469
——— *v.* Jones, [1921] 1 K. B. 22 450
——— *v.* Thomas, 2 Camp. 647 374
Thompson, *In re*, 91 L. T. 680 343
——— *v.* Dunn, L. R. 5 Ch. 573; 18 W. R. 854 542
——— *v.* Hickman, [1907] 1 Ch. 550 164
——— *v.* R., [1918] A. C. 221 119
——— *v.* Trevanion, Skinner, 402; Cockle, L. C. 65 . . 61
Thomson *v.* Austen, 2 Dowl. & Ry. 361 253
——— *v.* Simpson, 18 W. R. 1090 162
Thornhill, *In re*, [1904] W. N. 112 357
Tidesley *v.* Harper, 10 Ch. D. 393; 48 L. J. Ch. 495; 39 L. T. 552; 27 W. R. 249 606
Tilly, *Ex parte*, *In re* Scharrer, 20 Q. B. D. 518; 59 L. T. 188; 36 W. R. 388 573
Tobakin *v.* Dublin Southern Tramways Co., [1905] 2 Ir. R. 58 . 557
Tootal's Trusts, *In re*, 23 Ch. D. 532; 52 L. J. Ch. 664; 32 W. R. 653 224
Topham *v.* M'Gregor, 1 Car. & K. 320 154
Toronto Rail. Co. *v.* Corporation of Toronto, [1904] A. C. 809 . 392
Townend *v.* Toker, L. R. 1 Ch. 446; 35 L. J. Ch. 608; 14 W. R. 806 167
Tracy Peerage Case, 10 Cl. & F. 191 43
Trade, The Board of, *Ex parte*, *In re* Brünner, 19 Q. B. D. 572 . 91
Trelawney *v.* Coleman, 1 B. & Ald. 90 70
Trimlestown (Lord) *v.* Kemmis, 9 Cl. & F. 763 . . 267, 270, 383
Trinidad Asphalte Co. *v.* Coryat, [1896] A. C. 587; 65 L. J. P. C. 100; 75 L. T. 108 402
Trotter *v.* Maclean, 13 Ch. D. 574; 49 L. J. Ch. 256; 42 L. T. 118; 28 W. R. 244 276
Trufort, *In re*, 36 Ch. D. 600 390
Trust and Investment Corporation of South Africa, *In re*, [1892] 3 Ch. 332; 62 L. J. Ch. 22; 67 L. T. 777; 40 W. R. 689; 2 R. 76 576
Turnbull & Co. *v.* Duval, [1902] A. C. 429 613

PAGE
Turnbull *v.* Vickers, Ltd., [1914] 7 B. W. C. C. 396 . . . 407
Turner, *In re*, [1906] W. N. 27 49
——— *v.* Collins, L. R. 7 Ch. 329; 41 L. J. Ch. 558; 25 L. T. 374 . 144
——— *v.* Hellard, 30 Ch. D. 390; 55 L. J. Ch. 799; 53 L. T. 799; 34 W. R. 420 223
Turquand, *Ex parte*, 14 Q. B. D. 636; 54 L. J. Q. B. 242; 53 L. T. 579; 33 W. R. 437 132
Tussaud *v.* Tussaud, 9 Ch. D. 363; 47 L. J. Ch. 849; 39 L. T. 113; 26 W. R. 874 495
Two Sicilies (King of the) *v.* Wilcox, 1 Sim. (N.S.) 331 . . 193
Tyrrell *v.* Cole, [1919] W. N. 10; 120 L. T. 156 218
——— *v.* Painton, [1894] P. 151; 70 L. T. 453; 42 W. R. 343 . 145
Tyrwhitt *v.* Wynne, 2 B. & Ald. 554 107

U.

Union Steamship Co., etc. *v.* Melbourne, etc., Commissioners, 9 App. Cas. 365 504
United States of America *v.* McRae, L. R. 3 Ch. 79; 37 L. J. Ch. 129; 17 L. T. 428; 16 W. R. 377 193
University College of North Wales *v.* Taylor, [1908] P. 140 . . 498
University College, Oxford *v.* Oxford Corporation, 68 J. P. 470 . 110, 345
Uxbridge Union *v.* Winchester Union, 91 L. T. 533 . . . 391

V.

Vacher & Sons *v.* London Society of Compositors, [1913] A. C. 107 . 503
Vadala *v.* Lawes, 25 Q. B. D. 310; 63 L. T. 128; 38 W. R. 599 . 400
Vagliano *v.* Bank of England, [1891] A. C. 107; 60 L. J. Q. B. 145; 64 L. T. 353; 39 W. R. 657 408
Valentine *v.* Valentine, [1901] P. 283 586
Vallance, *In re*, 24 Ch. D. 177; 52 L. J. Ch. 791; 32 W. R. 387 . 224
——— *v.* Blagden, 26 Ch. D. 353; 32 W. R. 918 . . . 361
Van Diemen's Land Co. *v.* Marine Board, etc., [1906] A. C. 92 . 108, 345
Van Wart *v.* Woolley, Ry. & M. 4 370
Vander Donckt *v.* Thellusson, 8 C. B. 812; 19 L. J. C. P. 12 . 49
Vane *v.* Whittington, 2 Dowl. (N.S.) 757 368
Vaughan *v.* Vanderstegen, 2 Drew. 363 405
Vavasseur *v.* Vavasseur, 25 T. L. R. 250 454
Verminck *v.* Edwards, 29 W. R. 189 564
Verry *v.* Watkins, 7 C. & P. 308; Cockle, L. C. 108 . . . 122
Vezey *v.* Rashleigh, [1904] 1 Ch. 634; 73 L. J. Ch. 422; 52 W. R. 442 . . . . . 157, 163, 165
Villen *v.* Beaumont, 2 Dyer, 146 a 167
Vinnicombe *v.* Butler, 3 Sw. & Tr. 580; 34 L. J. P. & M. 18; 10 Jur. 1109; 19 W. R. 392 339
Vitoria, *In re*, [1894] 2 Q. B. 387 393
Voinett *v.* Barrett, 55 L. J. Q. B. 39; 34 W. R. 161 . . . 400
Volent *v.* Soyer, 13 C. B. 231; 22 L. J. C. P. 83 . . . 251, 317
Vowles *v.* Young, 13 Ves. 140 . . . . . 300, 303
Vyner *v.* Wirrall Rural Council, 73 J. P. 242 . . . 293, 297

W.

Waddington *v.* Roberts, L. R. 3 Q. B. 579; 37 L. J. Q. B. 256; 16 W. R. 1040 336

PAGE
Wagstaff, *In re*, 98 L. T. 149 611
——— *v.* Wilson, 4 B. & Ad. 339; 1 N. & M. 1 . . . 370
Waite *v.* Bingley, 21 Ch. D. 674; 51 L. J. Ch. 651; 30 W. R. 698 224
Wake *v.* Harrop, 31 L. J. Ex. 451 157
Wakefield (Mayor, etc., of) *v.* Cooke, [1904] A. C. 31; 73 L. J. K. B. 88; 89 L. T. 707; 52 W. R. 321; 68 J. P. 225 . . 391, 393
Wakelin *v.* London & South Western Rail. Co., 12 App. Cas. 41; 56 L. J. Q. B. 229; 55 L. T. 709; 35 W. R. 141; 51 J. P. 404 . . . . . 136, 138, 146, 603
Wakley *v.* Cooke, 4 Ex. 511 287
Waldridge *v.* Kennison, 1 Esp. 142 . . . . . 252, 253
Waldy *v.* Gray, L. R. 20 Eq. 238; 44 L. J. Ch. 394; 32 L. T. 531; 23 W. R. 676 313
Walker, *In re*, 53 L. T. 660; 34 W. R. 95 174
———, *In re*, [1909] P. 115 356
——— *v.* Beauchamp (Countess), 6 C. & P. 561 . . . 292
——— *v.* Smith, 29 Beav. 396 144
——— *v.* Wilsher, 23 Q. B. D. 335; 58 L. J. Q. B. 501; 37 W. R. 723 . . . . . 252, 253
Walker (Peter) & Son, Ltd. *v.* Hodgson, [1909] 1 K. B. 239 . 538
Wallace *v.* Small, M. & M. 446 252
Wallis *v.* Littell, 11 C. B. (N.S.) 369; 31 L. J. C. P. 100; 8 Jur. (N.S.) 745; 10 W. R. 192 165
Walsh *v.* Trevanion, 15 Q. B. 733 488
Walsham *v.* Stainton, 2 H. & M. 1 556
Walter *v.* Ashton, [1902] 2 Ch. 282; 71 L. J. Ch. 839; 87 L. T. 106; 51 W. R. 131 418
Walton *v.* Topakyan, 53 W. R. 657 394
Want *v.* Moss, 70 L. T. 178 398
Ward *v.* Londesborough (Lord), 12 C. B. 252 129
——— *v.* Marshall, 3 T. L. R. 578 558
——— *v.* Sinfield, 49 L. J. C. P. 696; 43 L. T. 252 . . . 468
Waring *v.* Waring, 6 Moo. P. C. 341 186
Warner *v.* Mosses, 16 Ch. D. 100 607
Warren *v.* Warren, 1 C. M. & R. 250; 4 Tyr. 850 . . 129, 338
Warrington *v.* Early, 2 E. & B. 763; 23 L. J. Ex. 47; 18 Jur. 42 490
Watcham *v.* A. G. of the East Africa Protectorate, [1919] A. C. 533 . . . . . 160, 480
Watkins *v.* Vince, 2 Stark. 368 380
Watson *v.* Jones, Watson *v.* M'Ewan, [1905] A. C. 480 . 204, 471
Watts *v.* Lyons, 6 M. & G. 1047 465
Waygood *v.* James, L. R. 4 C. P. 361; 38 L. J. C. P. 195; 17 W. R. 824 391
Weall *v.* James, 68 L. T. 515 394
Weary *v.* Alderson, 2 M. & Rob. 127 380
Webb, *In re*, Ir. R. 5 Eq. 235 356
——— *v.* East, 5 Ex. D. 23, 108. . . . . 193, 252
——— *v.* Herne Bay Commissioners, L. R. 5 Q. B. 642; 39 L. J. Q. B. 221; 22 L. T. 745 416
Webber, *Ex parte*, 41 L. J. Ch. 145; 26 L. T. 227; 20 W. R. 394 . 575
Webster *v.* Friedeberg, 17 Q. B. D. 736 611
Weeks *v.* Birch, 69 L. T. 759 . . . . . 382, 410
——— *v.* Sparke, 1 M. & S. 679; 14 R. R. 546; Cockle, L. C. 212 295
Welch *v.* Phillips, 1 Moo. P. C. 299 340
Weld-Blundell *v.* Wolseley, [1903] 2 Ch. 664 43
Wellesley's Case (Long), 9 Russ. & M. 639 579
Wells *v.* Wells, L. R. 18 Eq. 504; 43 L. J. Ch. 681; 31 L. T. 16; 22 W. R. 893 497
Welsbach, etc., Co. *v.* New Sunlight Co., [1900] 2 Ch. 1 . 367, 544

PAGE
Wenman (Lady) *v.* Mackenzie, 5 E. & B. 447; 25 L. J. Q. B. 44; 1 Jur. (N.S.) 1015, 1049 n. 57, 298
Wennhak *v.* Morgan, 20 Q. B. D. 635 252
Wentworth *v.* Lloyd, 10 H. L. Cas. 589; 33 L. J. Ch. 688; 10 L. T. 767; 10 Jur. (N.S.) 961 . . . . . 203, 355
West *v.* Baxendale, 9 C. B. 141; 19 L. J. C. P. 149 . . . 605
—— *v.* Lord Sackville, [1903] 2 Ch. 378; 72 L. J. Ch. 649; 88 L. T. 814; 51 W. R. 625 535
Westinghouse *v.* Midland Rail. Co., 48 L. T. 462 . . 250, 556
Westmacot *v.* Westmacot, [1899] P. 183; 68 L. J. P. 63; 80 L. T. 632 228
Weston, *In re*, Bartholomew *v.* Menzies, [1902] 1 Ch. 680 . . 455
Whaley *v.* Masserene, 8 Ir. Jur. (N.S.) 281 272
Wheeler, In the Goods of, 31 L. J. P. M. & A. 40 . . . 357
——— *v.* Le Marchant, 17 Ch. D. 675; 50 L. J. Ch. 793; 44 L. T. 632; 30 W. R. 235 . . . . . 202, 208, 250, 557
Wheelton *v.* Hardisty, 8 E. & B. 232 148
Whicker *v.* Hume, 7 H. L. Cas. 124 390
Whistler *v.* Ruskin, Times Newspaper, Nov. 26th and 27th, 1878 . 43
Whitcomb *v.* Whiting, 2 Doug. 652; 1 Sm. L. C. 555 . . . 377
White, *In re*, [1901] 1 Ch. 570; 70 L. J. Ch. 300; 84 L. T. 199; 49 W. R. 429 357
—— *v.* Credit Reform Association, Ltd., [1905] 1 K. B. 653...543, 545
——— *v.* Parkin, 12 East, 578 159
——— *v.* Spafford & Co., [1901] 2 K. B. 241; 70 L. J. K. B. 658; 84 L. T. 574 549
——— *v.* White, 62 L. T. 663 375
White's Charities, *In re*, [1898] 1 Ch. 659; 67 L. J. Ch. 430; 78 L. T. 550; 46 W. R. 479 359
Whitechurch (George), Ltd. *v.* Cavanagh, [1902] A. C. 117; 71 L. J. K. B. 400; 85 L. T. 349; 50 W. R. 218 . 379, 408, 416
Whitelegg, In the Goods of, [1899] P. 267 50
Whitelocke *v.* Baker, 13 Ves. 511; 9 R. R. 216 300
Whiting to Loomes, 17 Ch. D. 10; 50 L. J. Ch. 463; 29 W. R. 435 258
Whiting *v.* Turner, 89 L. T. 71 339
Whitmarsh *v.* George, 8 B. & C. 556 381
Whitmores *v.* Stanford, [1909] 1 Ch. 427 358
Whittaker *v.* Scarborough Post, [1896] 2 Q. B. 148 . . . 539
Whitworth's Case, 19 Ch. D. 118; 51 L. J. Ch. 71; 45 L. T. 449; 30 W. R. 33 575
Wiedemann *v.* Walpole, [1891] 2 Q. B. 534; 60 L. J. Q. B. 762; 40 W. R. 114 . . . . . 85, 375, 448
Wigglesworth *v.* Dallison, 1 Doug. 201; 1 Bligh, 287; 1 Sm. L. C. 613 . . . . . 157, 166, 481
Wilcox *v.* Gotfrey, 26 L. T. 328, 481 448
Wilkes *v.* Hopkins, 1 C. B. 737; 3 Dowl. & L. 184; 14 L. J. C. P. 225 368
——— *v.* Wood, 19 How. St. Tr. 1153 . . . . . 20, 516
Wilkinson *v.* Blades, [1896] 2 Ch. 788; 65 L. J. Ch. 846; 75 L. T. 175; 45 W. R. 27 395
Willans *v.* Ayers, 3 App. Cas. 133 157
Williams *v.* Davies, 11 Q. B. D. 74; 47 J. P. 581; 52 L. J. M. C. 87 399
——— *v.* East India Co., 3 East, 192; 6 R. R. 589; Bull. N. P. 298; Cockle, L. C. 26 . . . . . 136, 349
——— *v.* Evans, 1 Ex. D. 277 . . . . . 504, 509
——— *v.* Eyton, 4 H. & N. 357; 27 L. J. Ex. 176 . . . 337
——— *v.* Frere, [1891] 1 Ch. 323; 60 L. J. Ch. 328; 64 L. T. 253 566

PAGE

Williams *v.* Heales, L. R. 9 C. P. 171; 43 L. J. C. P. 80; 22 W. R. 317 409
——— *v.* Innes, 1 Camp. 364; Cockle, L. C. 175 379
——— *v.* Preston, 20 Ch. D. 672; 51 L. J. Ch. 927; 47 L. T. 265; 30 W. R. 555 370
——— *v.* Prince of Wales' Life Assurance Co., 23 Beav. 338 . 565
——— *v.* Quebrada Rail. Co., [1895] 2 Ch. 751; 65 L. J. Ch. 68; 73 L. T. 397; 44 W. R. 76 . . . . . 207, 556
——— *v.* Star Newspaper Co., 24 T. L. R. 297 234
——— *v.* Williams, L. R. 1 P. & D. 29 375
Williamson *v.* Rover Cycle Co., [1901] 2 Ir. R. 615 . . 353, 355
——— *v.* Williamson, L. R. 7 Eq. 542; 20 L. T. 389; 17 W. R. 607 374
Willis *v.* Baddeley, [1892] 2 Q. B. 324; 61 L. J. Q. B. 769; 67 L. T. 206; 40 W. R. 577 . . . . . 544, 559
——— *v.* Bernard, 8 Bing. 376; 1 L. J. C. P. 118 70
——— *v.* Jernegan, 2 Atk. 252 373
Willman *v.* Worrall, 8 C. & P. 380 45
Wills *v.* Palmer, 53 W. R. 169 267
Wills' Trade Marks, *In re*, [1892] 3 Ch. 201; 67 L. T. 453; 9 R. P. C. 346 550
Wilmott *v.* Barber, 15 Ch. D. 105; 49 L. J. Ch. 793; 28 W. R. 913 413
Wilson *v.* De Coulon, 22 Ch. D. 841 589
——— *v.* Hodges, 2 East, 312; Cockle, L. C. 28 355
——— *v.* O'Leary, L. R. 7 Ch. 448; 41 L. J. Ch. 342; 26 L. T. 463; 20 W. R. 501 496
——— *v.* Rastall, 4 T. R. 759 . . . . . 202, 204
——— *v.* Wilson, [1903] P. 157 50
Winans *v.* Att.-Gen., [1904] A. C. 287 358
Windsor *v.* R., 7 B. & S. 360 453
Wing *v.* Angrave, 8 H. L. Cas. 183; 30 L. J. Ch. 65; Cockle, L. C. 34 357
Wintle, *In re*, L. R. 9 Eq. 373; 21 L. T. 781; 18 W. R. 394 . 226
Witt *v.* Witt and Klindworth, 3 Sw. & T. 143; 32 L. J. P. 179; 8 L. T. 175; 11 W. R. 154; 9 Jur. (N.S.) 207 69
Wolverhampton New Water Works Co. *v.* Hawksford, 5 C. B. (N.S.) 703 541
Wood *v.* Braddick, 1 Taunt. 104 377
——— *v.* Mackinson, 2 M. & Rob. 273; Cockle, L. C. 271 . 466, 571
Woodcock *v.* Houldsworth, 16 M. & W. 124 43
Woodcraft *v.* Kinaston, 2 Atk. 317 220
Woods *v.* Dean, 3 B. & S. 101; 32 L. J. Q. B. 1; 7 L. T. 561; 11 W. R. 22 373
Woodward *v.* Buchanan, L. R. 5 Q. B. 285; 39 L. J. Q. B. 71; 22 L. T. 123 56
——— *v.* Goulstone, 11 App. Cas. 469; 56 L. J. P. 1; 55 L. T. 790; 35 W. R. 337; 51 J. P. 307 . . . . . 310, 495
Wooler *v.* N. E. Breweries, [1910] 1 K. B. 24 506
Woolway *v.* Rowe, 1 A. & E. 114; 3 N. & M. 849; 3 L. J. K. B. 121; Cockle, L. C. 179 . . . . . 268, 376, 382
Working Men's Mutual Society, *In re*, 21 Ch. D. 831 . . . 598
Worthington *v.* Moore, 64 L. T. 338 240
Wray *v.* Wray, [1905] 2 Ch. 349 161
Wright *v.* Bagnall, [1900] 2 Q. B. 240 407
——— *v.* Carter, [1903] 1 Ch. 27; 72 L. J. Ch. 138; 51 W. R. 196 350
——— *v.* Doe dem. Tatham, 1 A. & E. 3 . . . . . 90, 280
——— *v.* Doe, 7 A. & E. 313; 4 Bing. N. C. 489; Cockle, L. C. 72; 5 Cl. & F. 670 . . . . . 55, 211, 293
——— *v.* Hearson, [1916] W. N. 216 599

PAGE

Wright *v.* Rogers, L. R. 1 P. & D. 678; 38 L. J. P. & M. 67; 21 L. T. 156; 17 W. R. 833 . . . . 242, 339
——— *v.* Sanderson, 9 P. D. 149; 53 L. J. P. D. & A. 1; 32 W. R. 560 339
——— *v.* Tatham, 1 A. & E. 3 . . . . . 90, 280
——— *v.* Vernon, 22 L. J. Ch. 447 556
Wyatt *v.* Palmer, [1899] 2 Q. B. 106; 68 L. J. Q. B. 709; 80 L. T. 639; 47 W. R. 549 391
Wynne *v.* Tyrwhitt, 4 B. & Ald. 376 272

Y.

Yearwood's Trusts, *In re*, 5 Ch. D. 545; 46 L. J. Ch. 478; 25 W. R. 461 174
Yool *v.* Ewing, [1904] 1 Ir. R. 434 65
Yorkshire Laundries, Ltd. *v.* Pickles, [1901] W. N. 28 . . 610
Yorkshire Provident Co. *v.* Gilbert, [1895] 2 Q. B. 148 . 551, 552
Young, *Ex parte*, *In re* Kitchin, 17 Ch. D. 668; 50 L. J. Ch. 824; 45 L. T. 90 397
———, *Ex parte*, *In re* Quartz Hill, &c., Co., 21 Ch. D. 642. . 608
——— *v.* Ashley Gardens Properties, Ltd., [1903] 2 Ch. 112 . 536
——— *v.* Grote, 4 Bing. 253 412
——— *v.* Holloway, 12 P. D. 167; 56 L. J. P. 81; 57 L. T. 515; 35 W. R. 751 557
——— *v.* Schuler, 11 Q. B. D. 651; 49 L. T. 546 . . . 161
——— *v.* Wright, 1 Camp. 159 369
——— *v.* Young Manufacturing Co., Ltd., [1900] 2 Ch. 753; 69 L. J. Ch. 868; 83 L. T. 418; 49 W. R. 115 608

TABLE OF STATUTES.

[*The numerals in bolder type indicate the page on which the section of the Statute will be found set out in full.*]

		PAGE
1 Eliz. c. 1.	(Act of Supremacy, 1558)	446
43 Eliz. c. 2.	(Poor Law Act, 1601)	507
21 Jac. I. c. 16.	(Statute of Limitations, 1623)...156, 251, 253, 377	
29 Car. II. c. 3.	(Statute of Frauds, 1677)...155, 162, 163, 165, 534	
7 Will. III. c. 3.	(Treason Act, 1695), ss. 2, 4	449
9 Will. III. c. 35.	(Blasphemy Act, 1697)	446
1 Anne, st. 2, c. 9.	(Criminal Procedure Act, 1702), s. 3	515
39 & 40 Geo. III. c. 93.	(Treason Act, 1800)	448
c. 94.	(Criminal Lunatics Act, 1800)	186
41 Geo. III. c. 90.	(Crown Debts Act, 1801), s. 9	217
45 Geo. III. c. 92.	(Writ of Subpœna Act, 1805), s. 3	580
46 Geo. III. c. 37.	(Witness Act, 1806)	195
52 Geo. III. c. 146.	(Parochial Registers Act, 1812), s. 7	227
56 Geo. III. c. 139.	(Parish Apprentices Act, 1816)	337
5 Geo. IV. c. 83.	(Vagrancy Act, 1824)	184
6 Geo. IV. c. 50.	(Juries Act, 1825), s. 23	329
7 & 8 Geo. IV. c. 53.	(Excise Management Act, 1827), s. 17.	337
9 Geo. IV. c. 84.	(Lord Tenterden's Act)—(Statute of Frauds Amendment Act, 1828)	155, 377
	s. 1	377
1 & 2 Will. IV. c. 32.	(Game Act, 1831), s. 42	141
3 & 4 Will. IV. c. 42.	(Civil Procedure Act, 1833)—	
	s. 26	172
	s. 27	172
c. 49.	(Quakers and Moravians Act, 1833)	188
c. 82.	(Separatists Affirmation Act, 1833)	188
c. 106.	(Inheritance Act, 1833)	382
5 & 6 Will. IV. c. 62.	(Statutory Declarations Act, 1835)	536
6 & 7 Will. IV. c. 85.	(Marriage Act, 1836)	338
c. 86.	(Births and Deaths Registration Act, 1836)	229, 276
	s. 38	227
7 Will. IV. & 1 Vict. c. 26.	(Wills Act, 1837)—	
	s. 21	162, 490
	s. 28	491
1 & 2 Vict. c. 77.	(Quakers and Moravians Act, 1838)	188
c. 94.	(Public Record Office Act, 1838)	224
	s. 12	225
	s. 13	224
c. 105.	(Oaths Act, 1838)	189
3 & 4 Vict. c. 92.	(Non-parochial Registers Act, 1840), ss. 9, 11, 12, 17	228
5 & 6 Vict. c. 51.	(Treason Act, 1842), s. 1	448
6 & 7 Vict. c. 18.	(Parliamentary Registration Act, 1843), s. 88	450

		PAGE
6 & 7 Vict. c. 82.	(Evidence by Commission Act, 1843)—	
	s. 5	578, 589
	s. 6	578
c. 85.	(Lord Denman's Act)—(Evidence Act, 1843)	173, 175
7 & 8 Vict. c. 81.	(Marriage (Ireland) Act, 1844)	228
8 & 9 Vict. c. 16.	(Companies Clauses Consolidation Act, 1845), s. 127	226
c. 75.	(Lord Campbell's Libel Act, 1845)	371
c. 87.	(Prevention of Smuggling Act, 1845)	181
c. 109.	(Gaming Act, 1845), s. 3	517
	s. 6	517
	s. 7	518
c. 113.	(Evidence Act, 1845)—	
	s. 1	215, 225, 320
	s. 2	219
	s. 3	217
9 & 10 Vict. c. 93.	(Lord Campbell's Fatal Accidents Act, 1846)	396, 508
	s. 3	508
c. 95.	(County Courts Act, 1846)	173
10 Vict. c. 27.	(Harbours, Docks, and Piers Clauses Act, 1847), s. 90	221
11 Vict. c. 12.	(Treason Felony Act, 1848)	448, 449
11 & 12 Vict. c. 42.	(Jervis's Act)—(Indictable Offences Act, 1848)	281, 287, 288, 514
	s. 17	282, 285, 308
	s. 18	100, 521
c. 43.	(Summary Jurisdiction Act, 1848)	514
12 & 13 Vict. c. 103.	(Summary Jurisdiction Act, 1849), s. 9	515
14 & 15 Vict. c. 99.	(Lord Brougham's Act)—(Evidence Act, 1851)	182, 218, 226, 320
	s. 2	173, **617**
	s. 3	176, 192, **617**
	s. 4	173
	s. 6	**617**
	s. 7	222, **617**
	s. 8	226, **618**
	s. 10	219
	s. 11	**618**
	s. 13	**618**
	s. 14	215, 223, 226, **619**
	s. 18	222
c. 100.	(Criminal Procedure Act, 1851), s. 14	222
15 & 16 Vict. c. 76.	(Common Law Procedure Act, 1852)	368
c. 86.	(Chancery Procedure Act, 1852), s. 54	278
16 & 17 Vict. c. 30.	(Criminal Procedure Act, 1853), s. 9	577
c. 83.	(Evidence Amendment Act, 1853)	173, 181, 182
	s. 1	**619**
	s. 2	**619**
	s. 3	200, 252, **619**
	s. 5	**620**
c. 107.	(Customs Consolidation Act, 1853), s. 307	337
17 & 18 Vict. c. 34.	(Attendance of Witnesses Act, 1854), s. 1	578
18 & 19 Vict. c. 111.	(Bills of Lading Act, 1855), s. 3	360
19 & 20 Vict. c. 96.	(Marriage (Scotland) Act, 1856)	228
c. 97.	(Mercantile Law Amendment Act, 1856), s. 14	377

		PAGE
19 & 20 Vict. c. 113.	(Foreign Tribunals Evidence Act, 1856)	589
20 & 21 Vict. c. 77.	(Probate Act, 1857)—	
	s. 24	242
	ss. 64, 65	224
21 & 22 Vict. c. 25.	(Births and Deaths Registration Act, 1858)	228
c. 27.	(Chancery Amendment Act, 1858)	368
c. 90.	(Medical Act, 1858), s. 27	130
c. 93.	(Legitimacy Declaration Act, 1858)	535
22 Vict. c. 20.	(Evidence by Commission Act, 1859)—	
	s. 1	578, 588
	s. 4	588
22 & 23 Vict. c. 63.	(British Law Ascertainment Act, 1859)—	
	s. 1	133
23 & 24 Vict. c. 127.	(Solicitors Act, 1860), s. 22	130
24 & 25 Vict. c. 11.	(Foreign Law Act, 1861), s. 1	48
c. 96.	(Larceny Act, 1861)—	
	s. 85	195
	s. 112	342
c. 99.	(Coinage Offences Act, 1861), s. 24	141
c. 100.	(Offences against the Person Act, 1861)—	
	s. 5	288
	s. 27	287
	s. 42	288
	s. 43	288
	s. 48	184
	s. 49	184
	s. 50	184
	s. 51	184
	s. 52	184, 288
	s. 53	184
	s. 54	184
	s. 55	184, 287
	s. 56	287
	s. 57	140
	s. 62	288
26 Vict. c. 27.	(Marriage (Ireland) Act, 1863)	228
27 & 28 Vict. c. 97.	(Registration of Burials Act, 1864)	229
28 Vict. c. 18.	(Criminal Procedure Act, 1865)	461, 467
	s. 2	520
	s. 3	461
	s. 4	468
	s. 5	468
	s. 6	34, 220, 221, **467**
	s. 7	237
	s. 8	45, 46, 47
28 & 29 Vict. c. 63.	(Colonial Laws Validity Act, 1865), s. 6	218
c. 104.	(Crown Suits Act, 1865), s. 34	181
30 & 31 Vict. c. 35.	(Russell Gurney's Act)—(Criminal Law Amendment Act, 1867)	285
	s. 3	515
	s. 5	515
	s. 6	5, 67, 68, 286
31 Vict. c. 4.	(Sales of Reversion Act, 1868), s. 1	350
31 & 32 Vict. c. 37.	(Documentary Evidence Act, 1868)—	
	s. 2	**620**
	s. 3	**620**
	s. 6	**620**
	Schedule	217, 218, **621**

		PAGE
31 & 32 Vict. c. 71.	(County Courts Admiralty Jurisdiction Act, 1868)	505
c. 125.	(Parliamentary Elections Act, 1868)	391
	s. 31	577
	s. 32	577
	s. 34	577
32 & 33 Vict. c. 51.	(County Courts Admiralty Jurisdiction Act, 1869)	505
	s. 2	505
c. 68.	(Evidence Further Amendment Act, 1869)	173, 182, 189, 199, 448
	s. 1	619
	s. 2	173, 447, **621**
	s. 3	124, 174, 200, **621**
	s. 4	188
33 & 34 Vict. c. 52.	(Extradition Act, 1870)—	
	s. 14	290, **291**
	s. 15	291
	s. 24	589
c. 75.	(Elementary Education Act, 1870)	142
c. 90.	(Foreign Enlistment Act, 1870)	142
c. 110.	(Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1870)—	228
34 & 35 Vict. c. 112.	(Prevention of Crimes Act, 1871)—	
	s. 18	221
	s. 19	35, 117
35 & 36 Vict. c. xiii.	(Tyne Coal Dues Act, 1872)	505
c. 33.	(Ballot Act, 1872), s. 24	450
c. 65.	(Bastardy Laws Amendment Act, 1872)	450
c. 94.	(Licensing Act, 1872)	141
36 & 37 Vict. c. 16.	(Marriage Law (Ireland) Amendment Act, 1873)	228
c. 60.	(Extradition Act, 1873), s. 4	291
c. 66.	(Judicature Act, 1873)	219, 348, 546
	s. 61	219
c. 71.	(Salmon Fishery Act, 1873), s. 45	226
c. 86.	(Elementary Education Act, 1873), s. 24	142
37 & 38 Vict. c. 35.	(Statute Law Revision Act (1), 1874)	172
c. 49.	(Licensing Act, 1874)	141
c. 62.	(Infants Relief Act, 1874)	407
c. 88.	(Births and Deaths Registration Act, 1874), s. 38	229
38 & 39 Vict. c. 55.	(Public Health Act, 1875), s. 174	155
c. 77.	(Judicature Act, 1875), s. 20	632
39 & 40 Vict. c. 61.	(Divided Parishes and Poor Law Amendment Act, 1876), s. 34	301, 451
40 & 41 Vict. c. 14.	(Evidence Act, 1877), s. 1	177, 184
41 & 42 Vict. c. 33.	(Dentists Act, 1878)	59
42 Vict. c. 11.	(Bankers' Books Evidence Act, 1879)	24, 321, 569, 607
	s. 2	321
	s. 3	320, 321
	s. 4	321
	s. 5	321
	s. 6	321
	s. 7	320, 321, 322
	s. 9	321
42 & 43 Vict. c. 34.	(Dangerous Performances Act, 1879)	288
	s. 4	142

		PAGE
42 & 43 Vict. c. 49.	(Summary Jurisdiction Act, 1879)	515
	s. 39 (2)	140
	s. 49	326
44 & 45 Vict. c. 41.	(Conveyancing Act, 1881)—	
	s. 3 (4)	335
	s. 16 (1)	554
	s. 55	375
c. 58.	(Army Act, 1881), s. 128	27
c. 60.	(Newspaper Libel and Registration Act, 1881), s. 15	130, 230
c. 61.	(Sunday Closing (Wales) Act, 1881)	506
c. 69.	(Fugitive Offenders Act, 1881)—	
	s. 24	517
	s. 29	291
45 & 46 Vict. c. 9.	(Documentary Evidence Act, 1882)	218
	s. 2	622
	s. 3	217, 622
	s. 4	217, 622
c. 39.	(Conveyancing Act, 1882), s. 10	491
c. 43.	(Bills of Sale Act, 1882)	486
	s. 8	231
c. 50.	(Municipal Corporations Act, 1882)—	
	s. 22	226
	s. 24	221, 226
c. 61.	(Bills of Exchange Act, 1882)—	
	s. 30	143, 360
	s. 54	411
	s. 55	411
	s. 64	341
c. 72.	(Revenue, Friendly Societies, and National Debt Act, 1882)—	
	s. 11	569
	s. 11 (2)	321
c. 75.	(Married Women's Property Act, 1882)	183, 184
46 & 47 Vict. c. 3.	(Explosive Substances Act, 1883), s. 6 (2)	196
c. 51.	(Corrupt and Illegal Practices Prevention Act, 1883), s. 59	196, 577
47 & 48 Vict. c. 14.	(Married Women's Property Act, 1884)	183, 184
c. 61.	(Judicature Act, 1884), s. 16	578
48 & 49 Vict. c. 69.	(Criminal Law Amendment Act, 1885)	51, 76, 184, 288, 450
	s. 2	447, 450
	s. 3	447, 450
	s. 4	450
	s. 10	518
c. 74.	(Evidence by Commission Act, 1885), s. 2	588
50 & 51 Vict. c. 28.	(Merchandise Marks Act, 1887)—	
	s. 2	141
	s. 19	196
c. 71.	(Coroners Act, 1887)—	
	s. 4	287
	s. 5	287
51 & 52 Vict. c. 43.	(County Courts Act, 1888)—	
	s. 110	573
	s. 111	574
	s. 112	574
	s. 180	220
c. 46.	(Oaths Act, 1888)	187, 188, 189
	s. 1	188

		PAGE
51 & 52 Vict. c. 46.	(Oaths Act, 1888)—	
	s. 2	189
	s. 5	190
c. 64.	(Law of Libel Amendment Act, 1888), s. 6	466
52 Vict. c. 10.	(Commissioners for Oaths Act, 1889)—	
	s. 1	638
	s. 6	219
52 & 53 Vict. c. 49.	(Arbitration Act, 1889), s. 8	576
c. 63.	(Interpretation Act, 1889)	510
	s. 1	510
	s. 2	510
	s. 3	510
	s. 9	131, 217
	s. 26	129, 334
53 & 54 Vict. c. 5.	(Lunacy Act, 1890), s. 329	334
c. 37.	(Foreign Jurisdiction Act, 1890), s. 6	289
c. 39.	(Partnership Act, 1890)	488
	s. 2 (3)	489
	s. 14	417
	s. 15	376
54 Vict. c. 17.	(Charitable Trusts Recovery Act, 1891), s. 5	222, 335
54 & 55 Vict. c. 39.	(Stamp Act, 1891)	255, 462
	s. 12	255, 257
	s. 14	254
	s. 15	254
55 Vict. c. 4.	(Betting and Loans (Infants) Act, 1892)—	
	s. 1	142
	s. 2	142
	s. 3	142
c. 6.	(Colonial Probates Act, 1892), s. 2	224
c. 9.	(Gaming Act, 1892)	407
55 & 56 Vict. c. 23.	(Foreign Marriages Act, 1892)	228
c. 57.	(Private Street Works Act, 1892)	391
c. 64.	(Witnesses (Public Inquiries) Protection Act, 1892)—	
	s. 1	472
	s. 2	472
56 & 57 Vict. c. 61.	(Public Authorities Protection Act, 1893)	407
	s. 1	508
	s. 2	365
c. 71.	(Sale of Goods Act, 1893), s. 56	602
57 & 58 Vict. c. 16.	(Judicature Act, 1894)	27
	s. 3	26, 323
c. 41.	(Prevention of Cruelty to Children Act, 1894)	51
	s. 17	52
c. 60.	(Merchant Shipping Act, 1894)	141, 231, 288
	s. 123	596
	s. 439	332
58 Vict. c. 9.	(Documentary Evidence Act, 1895)	621
59 & 60 Vict. c. 25.	(Friendly Societies Act, 1896), s. 100	622
60 & 61 Vict. c. 52.	(Dangerous Performances Act, 1897)	142, 288
61 & 62 Vict. c. 36.	(Criminal Evidence Act, 1898)	27, 101, 176, 177, 182, 289, 453, 464, 467, 520, 521
	s. 1	623, 624
	s. 1 (b)	178, 623
	s. 1 (d)	183, 201, 252, 623
	s. 1 (e)	196, 623

		PAGE
61 & 62 Vict. c. 36.	(Criminal Evidence Act, 1898)—	
	s. 1 (f)	120, 177, 522, **623**
	s. 2	179, **624**
	s. 3	179, 522, **624**
	s. 4	184, **624**
	s. 6	177, **624**
c. 39.	(Vagrancy Act, 1898)	184
c. 41.	(Prisons Act, 1898), s. 11	577
c. 58.	(Marriage Act, 1898)	227
	s. 7	227
63 & 64 Vict. c. 51.	(Money-lenders Act, 1900), s. 5	142
3 Edw. VII. c. 36.	(Motor Car Act, 1903), s. 9 (1)	447, 450
c. 38.	(Poor Prisoners' Defence Act, 1903)	179, 514
c. 42.	(County Courts Act, 1903), s. 3	508
4 Edw. VII. c. 15.	(Prevention of Cruelty to Children Act, 1904)	184
	s. 12	**624**
	s. 14	288
	s. 15	**624**
	s. 17	142, 326, **625**
	s. 18 (3)	**625**
	s. 23 (3)	**625**
	s. 24	**625**
5 Edw. VII. c. 15.	(Trade Marks Act, 1905)—	
	s. 40	230
	s. 41	230
	s. 50	230
	s. 51	230
	s. 52	230
6 Edw. VII. c. 32.	(Dogs Act, 1906), s. 1 (2)	325
c. 40.	(Marriage of Foreigners Act, 1906)	228
7 Edw. VII. c. 16.	(Evidence (Colonial Statutes) Act, 1907), s. 1	218
c. 23.	(Criminal Appeal Act, 1907)	528
	s. 8	528
	s. 9	528, 530
	s. 15	528
	s. 16	439, 527, 528
	s. 20	527
c. 29.	(Patents and Designs Act, 1907)—	
	s. 28 (3)	229
	s. 52 (3)	229
	s. 60	547
	s. 64	229
	s. 78	230
	s. 79	229
8 Edw. VII. c. 15.	(Costs in Criminal Cases Act, 1908)	580
c. 26.	(Naval Marriages Act, 1908)	227
c. 45.	(Punishment of Incest Act, 1908)—	
	s. 4 (4)	185
c. 59.	(Prevention of Crime Act, 1908)—	
	s. 10	121, 595
	Part I.	121
c. 67.	(Children Act, 1908)	142, 288, 450
	s. 14 (2)	142
	s. 27	184
	s. 29	68, 287
	s. 30	187, 450
	s. 38 (2)	142
	s. 120 (3)	142

		PAGE
8 Edw. VII. c. 67.	(Children Act, 1908)—	
	s. 123	142, 326
	s. 131	288
c. 69.	(Companies (Consolidation) Act, 1908)	322
	s. 174	209, 574, 575, 576
	s. 175	575, 576
	s. 225	219
9 Edw. VII. c. 39.	(Oaths Act, 1909)	188, 190, 457
	s. 2	**626**
	s. 3	**626**
c. 49.	(Assurance Companies Act, 1909), s. 21	226
1 & 2 Geo. V. c. 6.	(Perjury Act, 1911)	188
	s. 1	588
	s. 13	449
c. 28.	(Official Secrets Act, 1911), s. 9	**517**
2 & 3 Geo. V. c. 20.	(Criminal Law Amendment Act, 1912), s. 7	184
3 & 4 Geo. V. c. 7.	(Children (Employment Abroad) Act, 1913), s. 3 (4)	184
c. 27.	(Forgery Act, 1913), s. 16	20, 517
4 & 5 Geo. V. c. 58.	(Criminal Justice Administration Act, 1914)—	
	s. 10 (1) (a)	326
	s. 28	**626**
	s. 28 (2)	187, 450, 624, **626**
	s. 28 (3)	185, **626**
	s. 29	**627**
c. 59.	(Bankruptcy Act, 1914)—	
	s. 14	195
	s. 15	196, 197
	s. 16	222
	s. 25	573
	s. 26	221
	s. 26 (6)	222
	s. 28	221
	s. 42	351
	s. 137	221, 391
	s. 138	221
	s. 139	221
	s. 140	221
	s. 141	91, 221
	s. 142	221
	s. 143	221
	s. 146	129
	s. 154	139, 140
	s. 166	195, 197
5 & 6 Geo. V. c. 90.	(Indictments Act, 1915)	502
	s. 5	526
6 & 7 Geo. V. c. 50.	(Larceny Act, 1916)	117
	s. 20	195
	s. 21	195
	s. 22	195
	s. 40 (1)	118
	s. 42 (1)	21, 517
	s. 42 (2)	21, 517
	s. 43	**627**
	s. 43 (1)	35, 117, **627**
	s. 43 (2) (3)	197, **627**, **628**
c. 68.	(New Ministries and Secretaries Act, 1916)	218

RULES OF THE SUPREME COURT, 1883.

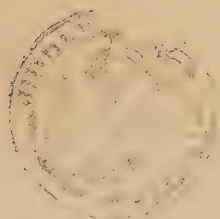
[*The numerals in bolder type indicate the page on which the rule of the Order will be found set out in full.*]

		PAGE
Order XIII.,	r. 4	394
	r. 6	394
Order XIV.		394
	r. 5	394
Order XIX.,	r. 4	386
	r. 13	**365**
	r. 21	548
	r. 25	12
	r. 28	93
Order XXI.,	r. 4	**365**
	r. 21	365
Order XXII.		365
	r. 1	365
	r. 6	365, 366
Order XXV.,	r. 5	**535**
Order XXVII.,	r. 3	394
Order XXVIII.,	r. 1	568, 605
	r. 2	568, 605
	r. 3	568, 605
	r. 4	568, 605
	r. 5	568, 605
	r. 6	568, 605
Order XXX.,	r. 1 (*a*) (*b*)	**629**
	r. 5	546
	r. 7	26, 323, **629**
Order XXXI.		547
	r. 1	533, 537, 538, **629**
	r. 2	24, 537, **629**
	r. 5	**630**
	r. 6	538, 541, **630**
	r. 8	537, **630**
	r. 9	533
	r. 11	546, **630**
	r. 12	24, 549, 550, **630**
	r. 13	**630**
	r. 13A	**630**
	r. 14	562, 590, **630**
	r. 15	547, 549, **631**
	r. 17	**631**
	r. 18	549, 563, **631**
	r. 19A	322, 549, 562, 570, **631**
	r. 20	564, **632**
	r. 21	566

PAGE

Order XXXI., r. 24 546
r. 26 . . . . . 537, 550
r. 29 . . . . . 547, 551
Order XXXII., r. 1 . . . . . **364**, 369
r. 2 . . . . . **368**, 590
r. 4 . . . . . **367**, 369
r. 6 . . . . . **364**, 369
r. 8 . . . . . 592, 594
Order XXXIII., r. 3 . . . . . 278, 376
Order XXXVI., r. 32 597
r. 37 122
r. 38 . . . . . 197, 465, 599
Order XXXVII., ... 289
r. 1 . . . . . 606, 607, 608, **632**
r. 2 . . . . . 607, **633**
r. 3 . . . . . 91, 280, **633**
r. 4 . . . . . 215, 218, 221, 312, **633**
r. 5 . . . . . 290, **583**, 584, 585, 587, **633**
r. 6 633
r. 6A 585, **633**
r. 7 . . . . . 565, 566, **633**
r. 8 . . . . . **633**
r. 9 . . . . . **633**
r. 10 . . . . . **633**
r. 11 . . . . . **633**
r. 12 . . . . . **633**
r. 13 . . . . . 588, **634**
r. 14 . . . . . 588, **634**
r. 15 . . . . . 588, **634**
r. 16 . . . . . **634**
r. 17 . . . . . **634**
r. 18 . . . . . 290, **634**
r. 19 . . . . . **634**
r. 20 . . . . . 571, **635**
r. 21 . . . . . **635**
r. 22 . . . . . **635**
r. 23 . . . . . **635**
r. 24 . . . . . **635**
r. 25 . . . . . 278, **635**
r. 26 . . . . . 571, 635
r. 27 . . . . . 571, 635
r. 28 . . . . . 571, 635
r. 29 . . . . . 571, 635
r. 30 . . . . . 571, 635
r. 31 . . . . . 571, 635
r. 32 . . . . . 571, 635
r. 33 . . . . . 571, 635
r. 34 . . . . . 571, 635
r. 34A 571, 635
r. 34B 571, 635
r. 35 . . . . . 534, 535, **635**
r. 36 . . . . . 534, **635**
r. 37 . . . . . 534, **636**
r. 38 . . . . . 534, **636**
r. 39 584
r. 54 . . . . . 588, 589
r. 55 . . . . . 588, 589
r. 56 . . . . . 588, 589
r. 57 . . . . . 588, 589

		PAGE
Order XXXVII.,	r. 58	588, 589
	r. 59	588
	r. 60	589
Order XXXVIII.,	r. 1	606, 636
	r. 2	636
	r. 3	608, 636
	r. 4	636
	r. 5	636
	r. 6	219, 636
	r. 7	637
	r. 8	637
	r. 9	637
	r. 10	637
	r. 11	637
	r. 12	637
	r. 13	637
	r. 14	637
	r. 15	637
	r. 16	638
	r. 17	638
	r. 18	638
	r. 19	638
	r. 19A	638
	r. 20	638
	r. 21	638
	r. 22	638
	r. 23	638
	r. 24	638
	r. 25	638
	r. 26	638
	r. 27	639
	r. 28	639
	r. 29	639
	r. 30	639
Order XXXIX.,	r. 6	614
	r. 8	254, 259
Order L.,	r. 3	24, 329, 570
	r. 4	329
	r. 5	329
Order LVIII.,	r. 4	605, 613
	r. 11	609, 639
	r. 12	609, 639
	r. 13	609, 640
Order LXI.,	r. 7	219, 226, 221
	r. 28	218
Order LXV.,	r. 27 (9)	580
Order LXVIII.,	r. 1 (*d*)	546



THE

Principles and Practice

OF THE

LAW OF EVIDENCE.

INTRODUCTION.

GENERAL PRINCIPLES OF EVIDENCE.

THE term "evidence," in its widest sense, includes everything which makes a fact evident. But lawyers use the word in a more restricted sense. In their phraseology it is employed to denote, and to denote only, all legal means, exclusive of mere argument, which tend to prove or disprove any alleged matter of fact, the existence of which is submitted to judicial investigation.

Such legal means do not necessarily include many means of arriving at the truth which would naturally present themselves to the mind of a layman. The law selects, sometimes rather arbitrarily, certain matters which it accepts as *relevant*, that is, legally admissible in evidence; it rejects many others which an ordinary citizen might deem material. In a law court the "best" evidence only is admissible.

Thus, as a rule, a copy of a document will not be accepted if the original is procurable; an eye-witness, if still alive, must himself be called before the Court, not a person to whom the eye-witness told what he saw. Even then it will often be difficult, owing to the absence of eye-witnesses, or conflicting statements made by eye-witnesses, or loss of original documents, to arrive satisfactorily at the truth. Owing to the exigencies of public and private business, there can seldom be absolute certainty as to the facts. Hence Courts of justice, like ordinary individuals, must act upon probabilities.

The general principles of the law of evidence are the same in civil and in criminal proceedings. At a trial the burden of proof lies generally on the plaintiff or prosecutor, who therefore begins; it is his duty to establish the case against the defendant or the accused, and this he must do by evidence. As soon as he tenders any matter in evidence, two questions at once arise: Is the matter which is sought to be proved admissible in evidence at all, and, if so, is the proof offered to the Court legitimate evidence of that fact? A third question will subsequently arise: What is the value or cogency of the evidence when admitted?

In court one constantly hears the objection taken, "That is not evidence," which may mean one or other of two very different things, either—

(i.) "That matter is not admissible in evidence at all; it is not relevant to the issue under trial;" or

(ii.) "That is not the proper way of proving a relevant fact."

Shortly then the substantive law of evidence may be divided into three parts :—

RELEVANCY, which defines what facts a party will be allowed to prove at the trial of any legal proceeding.

PROOF, which tells him in what way he will be allowed to prove an admissible fact.

COGENCY, which determines what value the tribunal should attach to such fact when admitted and proved.

And we must further describe the PROCEDURE of our Courts, which assists litigants to ascertain the truth.

We will deal with these four heads separately.

I. RELEVANCY.

First then we have to ascertain the rules which determine what facts a party will be allowed to prove in any given legal proceeding.

In the first place, this will be determined by the pleadings, if there are any ; for the pleadings define what matters the parties wish to have decided by the judge or jury. These matters are called "the issues." The Court will not enter upon any matters of controversy which are not set out or necessarily implied in the pleadings.

Again, it needs no evidence on any matter as to which the contention of one party has been admitted by the other.

As soon as the matters in dispute are thus ascertained, the rule is that every fact which directly tends to prove or disprove any of them is relevant

and admissible. So, within certain limits, is any fact which indirectly and circumstantially tends to prove or disprove any fact in issue.

In a civil action any fact which tends to affect the amount of damages is also relevant and admissible. In a criminal proceeding, facts which tend to reduce the amount of the sentence may be given in evidence before verdict; facts which tend to aggravate the sentence, such as a previous conviction, can, as a rule, only be proved after the jury has found the prisoner guilty. To these *primâ facie* rules there are, however, many exceptions.

We may lay down here five elementary propositions :—

(i.) A witness must only state facts; his mere personal opinion is not evidence. Hence what anybody thinks about the matter in issue is as a rule inadmissible, except where special experience or special training is necessary to enable the tribunal to form a true opinion; in such cases expert witnesses are permitted to state their views (*a*).

The object and effect of the rule which excludes evidence of opinion is to keep the witness, as much as possible, from trespassing on the functions of either judge or jury, whose province it is to draw all inferences from the facts.

In some cases, however, the Court is compelled to obtain the assistance of expert evidence; and there are many cases also in which witnesses who are not experts are allowed to state their belief as to the identity of persons, or as to their state and condition at a material time, or

(*a*) See Book I., Chap. II.

as to the condition, value, or identity of property, provided such belief is based on what the witness has himself observed. Thus, he may state that a person appeared to him drunk or sober, agitated or confused, or may give his opinion as to the age of a child whom he has seen.

(ii.) What third persons said or did behind the back of a party is as a rule inadmissible against that party. It would clearly be unfair to admit such evidence, as the party had no opportunity of contradicting the third person's statement or of protesting against his act. In some cases, however, it is necessary to admit such evidence, as leading up to or explaining the matter in issue. And evidence of what a third person did in the absence of a party will be more freely admitted than evidence of what he said or wrote (*b*).

If A. is indicted for the murder or manslaughter of B., any statement as to the cause of his death made by B. when he was in settled hopeless expectation of death will be admissible against A., although he was not present when B. made the statement (*c*). So a deposition duly taken under the provisions of the statute 30 & 31 Vict. c. 35, s. 6, is, in certain cases, admissible against a prisoner who was not present when it was made, provided he had had served upon him reasonable notice in writing of the intention to take such deposition and had full opportunity of being present and cross-examining the deponent (*cc*).

Again, anything said or done by a third person at the moment that a material act was done, or so shortly before or so shortly after it that it may fairly be said to form part of the same transaction, is admissible even though it

(*b*) See Book I., Chap. III.
(*c*) See *post*, p. 70.
(*cc*) See *post*, p. 67.

was not said or done in the hearing or presence of the party against whom it is tendered in evidence. Such matters are said to be part of the *res gestæ* (*d*).

(iii.) What third persons said or did in the presence or hearing of any party is only admissible in evidence against such party so far as it throws light upon that party's subsequent conduct, or tends in any other way to explain his statements or acts. Such evidence is of little or no value in itself, but it may occasion or elicit something from the party to which the Court will attach importance (*e*).

(iv.) Anything that either party said in the transaction in issue is admissible against that party, but not as a rule in his favour. Anything that either party did in the transaction in issue is admissible both for and against him (*f*).

(v.) Anything which either party said or did in some other transaction is as a rule inadmissible, unless it leads up to or explains the transaction in issue. But whenever the state of mind in which a party did an act is material, anything which that party said or did in some other transaction, previous or subsequent, may become admissible, if it throws light on the state of his mind when he did that act (*g*).

II. Proof.

As soon as a party has ascertained what facts he may endeavour to establish in any given

(*d*) See *post*, pp. 56, 61.
(*e*) See Book I., Chap. IV.
(*f*) See Book I., Chap. V.
(*g*) See Book I., Chap. VI.

litigation, the next question which naturally arises in his mind is this: By what method or methods shall I be allowed to prove these relevant facts? There are a few facts which can only be proved in a law court in one way; most facts however may legitimately be proved in more ways than one. The litigant naturally selects whichever way is cheapest and easiest, unless indeed he feels that a more expensive or less obvious way would be more cogent. Let us, then, consider the different ways in which a party is allowed to prove at the trial the facts upon which he relies.

In the first place, every relevant fact can be, and indeed must be, proved by either direct or circumstantial evidence, or by both.

Direct evidence is that which goes straight to establish the *factum probandum*, or fact in issue.

Circumstantial evidence (sometimes called indirect or inferential evidence) is that which establishes certain minor facts (*facta probantia*), the effect of which is to establish the fact in issue.

When direct evidence is given in court, the only question is, "Can I believe the witness?"

When circumstantial evidence is given there are two questions:—

(i.) Can I believe the witness? and

(ii.) What ought I to infer from his evidence? Does his evidence, taken in conjunction with that of other witnesses, establish the fact in issue?

Circumstantial evidence must fit in together; it must raise a violent presumption of the existence of the fact in issue; and then it will be as cogent as direct evidence.

Both direct and circumstantial evidence are equally admissible. Neither is technically "better" than the other; neither excludes the other.

If a prisoner is charged with murdering X. by shooting him in a wood, it is possible that the evidence may be forthcoming of someone who was in the wood at the time and saw the murder committed. This is direct evidence. Most frequently, however, in such a case the prosecution has to rely on circumstantial evidence. Thus, A. will say that the prisoner and X. quarrelled and were on bad terms; B., that the prisoner borrowed his gun on the day before the murder; C., that he saw the prisoner, carrying a gun, enter the wood at 7.50 on the morning of the murder, at 7.55 he saw X. enter it, and at 8 he heard a shot fired; he had noticed no one else about at the time; D. will depose that at 8.15 he saw the prisoner, without a gun, running away on the other side of the wood, looking agitated; E, that he found the body of X. lying in the wood with a gunshot wound in his head, and in the bushes ten yards away a gun, which B. swears is his; F., a gunsmith, states his opinion that the gun was recently discharged, and fired a bullet exactly similar to that found in the skull of the deceased; and G., a surgeon, pronounces that the wound was the cause of death. None of these witnesses has given direct evidence of the fact in issue—that is, Did the prisoner murder X.? The jury has to consider whether all these circumstances taken together establish the guilt of the prisoner. If there was any eye-witness of the deed, he can of course be called in addition to A. and the others who give only circumstantial evidence.

Whether it is sought to prove a relevant fact by either direct or circumstantial evidence, the evidence must be that of

(i.) Witnesses (*oral* evidence),

(ii.) Documents (*documentary* evidence), or

(iii.) Things (*real* evidence).

The testimony of a witness is wholly independent of the assistance of any other evidence, documentary or real, although, in certain cases, he may refer to documents to refresh his memory. But both documentary and real evidence generally require some oral evidence to make them admissible.

Again, if we look at the nature of such oral, documentary, or real evidence, we shall find that each piece of it must be either—

(i.) Primary, or

(ii.) Secondary,

that is, either the original witness, document, or thing is produced in court (this is primary evidence), or only some report, copy, or model (this is secondary evidence).

Primary evidence is that which its own production shows to be the best obtainable, *e.g.*, the original of a material document or the direct evidence of an eye-witness, who can say, "I saw it with my own eyes."

Secondary evidence is such evidence as on its production implies the existence of evidence superior to itself, such as one man's recollection of what another said or a copy of a material document. In other words, secondary evidence does not pretend to be original; it confesses that it is not the best evidence conceivable. But in certain circumstances it is admitted either for the sake of convenience, or for reasons of public policy, or because it is the best evidence obtainable.

Secondary or second-hand evidence is generally inadmissible, and it is always inadmissible until the absence of primary evidence has been explained to the satisfaction of the Court. Thus, if an action be brought on a contract which is contained in a writing, the writing itself is primary evidence and should be produced to show the terms of the contract. As long as it exists and can be obtained by reasonable diligence, no other written or oral evidence of its contents will be received; but if it be destroyed, or if it cannot be found after proper search, or if an adverse party, holding it, refuses to produce it after due notice, then either written or oral evidence may be given by anyone who is acquainted with the contents of the written instrument.

It will be observed that all these divisions are cross-divisions. There can be primary oral evidence (*e.g.*, the evidence given on oath of a bystander who saw what happened) and secondary oral evidence (*e.g.*, the deposition or official report of what that bystander said when he was examined before the magistrates—which is admissible only if at the date of the trial he be dead, insane, too ill to travel, or kept out of the way by the opposite party). Again, there may be primary documentary evidence (*e.g.*, the original letter itself) and secondary documentary evidence (*e.g.*, a copy of that letter, which will become admissible if the other party who holds the original refuses, after due notice, to produce it at the trial). A house which is alleged to be out of repair is the best primary real evidence of its own condition; a model of the house would be secondary real evidence. Any of these may be tendered in evidence, either as direct evidence of the fact in issue, or merely to prove some

evidentiary fact from which the truth of the fact in issue may be circumstantially inferred.

Note, also, that the presence of direct evidence does not exclude circumstantial, nor will circumstantial evidence exclude direct. The presence of oral evidence will not exclude either documentary or real, nor will the existence of real evidence exclude either oral or documentary. But the existence of documentary evidence does in some cases exclude oral; and the existence of primary evidence does, as a general rule, exclude secondary. Secondary oral evidence, which is usually called "hearsay," will not, as a rule, be admitted even where there is no primary oral evidence available. Secondary documentary evidence, on the other hand, is generally admitted, if the corresponding primary evidence cannot be produced (*h*).

The law, however, does not require that all facts should be strictly proved, or proved up to the hilt. The burden of proof is often lightened by—

(a) Presumptions,

(b) Admissions, and

(c) Estoppels.

(a) *Presumptions.*—On proof of certain facts the law will sometimes infer the existence of another fact, which then need not be expressly proved. This is called a presumption. It is rebuttable; that is, the other side may try to disprove it. But if they cannot do this, the law treats the fact presumed as proved. The presumption is not conclusive, but it shifts the burden of proof. No man

(*h*) See Book II., Chaps. VIII. and IX.

need either plead or prove that which the law already presumes in his favour (*i*). A presumption must be made: it is made by the Court; and it stands good till the contrary is proved (*k*).

(b) *Admissions* (*l*) are of two kinds: formal, which are made intentionally with a view to the litigation; informal, which are made without reference to any litigation.

In civil actions, statements made by A. "without prejudice" cannot be given in evidence against A. without his express consent. In criminal proceedings, an admission is generally called a "confession," and if a confession is made under the inducement of any threat or promise from a person in authority, it is inadmissible.

(c) *Estoppels.*—In some cases the law will not allow a litigant to plead, or attempt to prove at the trial, allegations which are directly contrary to that which has already been decided against him, or to that which he has himself represented to be the fact. He is said to be estopped (*m*) from pleading or proving such matters.

An estoppel is not a cause of action. It simply prevents a party from raising a particular contention in an action when to raise it would be inequitable or contrary to the policy of the law.

A presumption one may always try to rebut; an admission one will often be allowed to withdraw. But an estoppel is an absolute bar to the raising of

(*i*) Order XIX., r. 25.

(*k*) Note that throughout this volume the word "presumption" is used to indicate what other writers have termed "a rebuttable presumption of law." And see Book II., Chap. XI.

(*l*) See Book II., Chap. XII.

(*m*) See Book II., Chap. XIII.

a particular contention; and it binds not only the original parties, but also all persons who claim through or under them.

III. Cogency.

A certain number of relevant facts have been brought before the Court and established by legitimate evidence. The question now arises, What do these facts prove? What weight should be attached to them? What is the proper inference which the tribunal should draw from them?

The answer to this question is afforded by that branch of the law of evidence which we call "cogency."

If the facts so proved appear to be conflicting, the Court must either reconcile them or decide between them. And then the question arises, as it does when the facts stand uncontradicted, Are they sufficient for the Court to act upon? Do they establish either the affirmative or the negative of the question in issue?

This brings us at once to another question: What is the standard of proof required? What degree of certainty (or rather of probability) must be reached to enable the Court finally to decide the rights of the parties before it? Civil cases may be decided on a preponderance of probability, but in criminal cases there must exist no "reasonable doubt" (*n*).

(*n*) See Book III., "Cogency."

Absolute certainty is unattainable in any of the affairs of daily life. Hence Courts of justice, like individuals, are compelled to be satisfied with that inferior kind of certainty which is often miscalled "moral."

Proof can only be attained by means of evidence, but it is not always easy to say how much evidence or what kind of evidence will amount to proof. Hence we must now discuss the relative weight which should be given to each kind of evidence mentioned in the foregoing section (*o*).

The question often arises, Which is the more cogent, direct or circumstantial evidence? The direct evidence of a bystander who saw the thing done with his own eyes is *primâ facie* the more reliable, unless there is any reason for doubting either his veracity or his powers of observation. Yet a jury is often loath to convict a prisoner on the uncorroborated evidence of one man. On the other hand, when circumstantial evidence fits in together without a flaw it is as cogent as direct evidence.

A good witness must have—

(a) The opportunity to observe;

(b) The faculty of observation;

(c) Judgment to discriminate facts from inferences;

(d) A good memory;

(e) Power to express clearly and accurately what he does remember.

The best mode of testing the veracity of a witness is to watch his demeanour in the box. If he

(*o*) See Book III., Chap. I.

gives prompt, frank answers to all questions, whichever way they tell, he is probably speaking the truth. But if he is sometimes precipitate in answering questions which tell in favour of one side, and at other times affects not to hear or not to understand questions, so as to gain time to prepare his answer, if he is now eager, now affecting indifference, now evasive, now exaggerating, then he is probably lying. As a rule, a witness of truth is equally ready to answer and equally copious in his answers on all points; he will give details freely on matters which he knows are within the knowledge of the other side, and as to which therefore any inaccuracy would be at once detected.

There are certain cases in which the law requires a witness to be corroborated, and in which therefore the case will fail if no corroboration be forthcoming. There are other cases in which it is the duty of the judge to warn the jury that it is unsafe for them to act upon the uncorroborated testimony of a single witness. In the latter class of cases, it is still open to the jury, if they think fit, to disregard the warning of the learned judge, and find the facts according to their honest belief. Corroboration need not always be afforded by the evidence of a second witness. Thus on a charge of perjury a document written by the prisoner or an admission made by him may be sufficient corroboration.

When both documentary and oral evidence are before the Court, the question frequently arises, Which is entitled to more weight? A judge as a rule regards a document as of higher authority

than the treacherous memory of man. A jury likes to see the witnesses. But both would agree that documentary evidence is of great use in checking and explaining oral. It is extremely valuable when the oral evidence is conflicting. Great weight should be attached to the correspondence that passed before the quarrel began. The parties at that time did not contemplate the possibility of litigation; and what they then wrote stands and cannot be altered. *Litera scripta manet.*

Again, documentary evidence is useful to refresh the memory of a witness. Documents not otherwise admissible may be used for this purpose. But they must be documents which were written or dictated by that witness shortly after the event which they record, or which, if written by someone else, he read and approved shortly after the event.

It is the jury which decides what is the true meaning and effect of the evidence of a witness. But it is for the judge, except in cases of libel, to decide what is the construction that should be put on a document, though it is for the jury to decide whether any particular word contained in it is used in a special or unusual meaning in the trade or locality, and, if so, what that meaning is. The judge always starts with the assumption that the writer meant what he wrote. He will give to ordinary English words their ordinary English meaning, unless there is evidence to go to the jury that the words in this particular case bear some unusual and peculiar meaning. He will give to technical words their technical meaning. To a word which has both a strict and proper meaning, and also

a loose popular meaning (*e.g.*, "lands," which may include leaseholds; "children," which may include illegitimate children), he will give the strict and proper meaning, unless it be clear that the writer used the word in its loose popular meaning. Above all, he will construe the document *as a whole*, not divorcing isolated passages from their context, but giving due weight to every part.

Real evidence carries great weight as soon as it has been properly proved what it is and where it was found. But there is danger attaching to the production in court of a piece of such evidence without proper explanation; it is apt to make too great an impression on the minds of inexperienced jurymen. As soon as a bullet and a gun are produced, they jump to the conclusion that the accused is the man who committed the murder, before the gun has been proved to be his or the bullet has been shown to be the cause of death. We have an instance of this in the well-known stanza in Macaulay's poem "Horatius"—

> "They made a molten image,
> And set it up on high;
> And there it stands unto this day
> To witness if I lie."

Such a statue is no proof that the incident which it portrays ever actually occurred; it is, at best, some evidence that there was a tradition to this effect current in the locality at the time when the statue was erected.

Primary evidence is of course of far greater value than secondary. Oral evidence of the contents of

documents which are lost or destroyed, or not produced after due notice, is, it is true, admitted. But this kind of secondary evidence cannot well be tested, and therefore, unless it is very clear, it cannot be relied upon, whereas a copy of a document, if properly proved, is almost as good as the original document itself, except for the fact that there may be some erasures or other peculiarities in the original document which may not appear in the copy.

The evidence given in our law courts, be it oral or documentary, direct or circumstantial, is seldom, if ever, conclusive; it creates, as a rule, only a probability more or less strong; it falls short of positive proof. This is inevitable. The press of business, the shortness of the time available, the fallibility of human memory, all combine to prevent the tribunal from arriving at any conclusion with absolute certainty. Yet when the acumen of trained lawyers is combined with the common sense of practical jurymen, and the whole investigation is presided over and regulated by a calm and impartial judge, there rarely occurs a miscarriage of justice.

IV. Procedure.

The procedure of our Courts affords material assistance to a party in preparing his case as soon as legal proceedings are started. But there is very little machinery provided by our law for procuring or recording evidence before proceedings are commenced against some definite person. It would be well if more could be done in this direction. A

prosecutor or plaintiff has often to start somewhat in the dark. He must act on suspicion; he has to rely on hearsay evidence.

(a) *Criminal Proceedings.*

It is the duty of every good citizen to assist the police and the prosecutor by giving them all relevant information and calling their attention to any fact which may throw light on the identity of the criminal or the manner in which the crime was committed. In serious criminal cases information is readily afforded to the police; and in this way sufficient materials are as a rule obtained to justify a complaint or information being laid against a definite person.

Criminal proceedings are usually commenced with a Summons, bidding the accused appear in court before the magistrates on a certain day; in some cases a Warrant will be issued at once for his arrest. There are many cases, too, in which a policeman may arrest without a warrant a person whom he reasonably suspects of crime. It is the duty of the policeman as soon as he has effected an arrest to caution his prisoner that anything which he may say will be written down and used in evidence against him at his trial; but he ought not to cross-examine the prisoner with the object of inducing him to confess his guilt (*p*).

The prisoner may give evidence, if he chooses, both before the magistrates and on the subsequent

(*p*) *R.* v. *Knight*, 20 Cox, C. C. 711; 69 J. P. 108; but see *R.* v. *Best*, [1909] 1 K. B. 692, and *post*, p. 103.

trial, if any. But he cannot be compelled to do so, if unwilling. Nor, as a rule, can his wife be compelled to give evidence without his consent.

The magistrate can compel anyone likely to give material evidence to attend before him at the preliminary hearing of a criminal charge and state all that he knows. If the magistrate deems this statement of any value, he can bind him over to attend at the Assizes or Quarter Sessions and repeat his evidence there at the trial before the jury. The rules of evidence are the same at both stages of the proceedings.

So much for witnesses. As to documents and things, the police have no general power to search for evidence in the house either of the accused or of a third person. No doubt, on making an arrest, the police are entitled to search for and seize any document or thing which was used in the perpetration of the crime, such as a pistol or knife, or the tools of a burglar, or which throws any light on the identity of the criminal, such as a bloodstained shirt with his name on it. So in a case of forgery the police would be justified in impounding the forged document or any implements used in forging it (*q*). But they have no general power to examine or seize the books, papers or other property of the accused. Not even a Secretary of State can issue a general warrant authorising the police to seize all the papers of a person who is suspected of high treason or sedition (*r*).

(*q*) Forgery Act, 1913 (3 & 4 Geo. V. c. 27), s. 16.
(*r*) *Wilkes* v. *Wood*, 19 How. St. Tr. 1153; *Entick* v. *Carrington*, 19 How. St. Tr. 1030.

A wider power, however, exists in the case of stolen property. A justice of the peace may make an order authorising certain persons to enter a building to search for stolen goods, and to seize them if found. Such an order is called a search warrant; it must name or describe the persons authorised to search, the building to be searched, and the goods for which search is to be made. At common law a search warrant could only be issued in cases of larceny; but now by s. 42 (1) of the Larceny Act, 1916 (*s*), the power is extended to cases in which any property has been obtained by embezzlement, robbery, false pretences, burglary, receiving, or any other crime punishable under that Act. Moreover, by s. 42 (2) of the same Act, a chief officer of police may give authority in writing to any police constable to enter any house, shop, warehouse, yard or other premises which he has reason to believe are being made a receptacle for stolen goods, and to search for and seize any property which he believes to have been stolen.

In every other case search without a warrant is illegal.

Simple cases are summarily disposed of by the magistrates on the return of the summons. Grave criminal charges they send to the Assizes or Quarter Sessions to be tried by a jury. In this case the prosecution states in detail the precise charge against the prisoner in a pleading which is called an indictment. An indictment may be defined as an accusation in writing charging a definite person with the commission of a definite crime. It is

(*s*) 6 & 7 Geo. V. c. 50.

read over to the prisoner on his arraignment. In some few cases he must state his defence in a written plea, but as a rule he merely pleads "Guilty" or "Not guilty" orally from the dock. If he pleads "Guilty," the judge proceeds to pass sentence. If, however, he pleads "Not guilty," then a jury is sworn to try him on the charge set out in the indictment (*t*).

The prosecuting counsel in his opening speech states the facts on which the prosecution relies, and then calls evidence in support of his case. The witnesses are examined, cross-examined and sometimes re-examined. The prisoner may give evidence on oath and call witnesses or not, as he pleases. If he elects to give evidence, he is liable to be cross-examined. The examination and cross-examination of witnesses in open court is undoubtedly the best method of arriving at the truth.

At the end of the closing speeches of counsel, the judge directs the jury as to all points of law, but leaves them to decide all questions of fact. It is his duty to declare the common law and to construe the written law. He must state to the jury in general terms the law applicable to the case before them, accompanying this statement by any observations or explanations he deems desirable. He also advises them as to the bearing and value of the evidence brought forward by either side. But it is the jury, and not the judge, who must decide the

(*t*) A prisoner is not always tried on an indictment; he may also be arraigned on a criminal information, or a coroner's inquisition. But it is impossible in this Introduction to set out the details of criminal procedure; we can only give the barest outline of the practice in the most ordinary cases.

case. It is they who have to say, on the facts proved before them and on the law as laid down by the judge, whether the prisoner is guilty or not guilty of the crime with which he stands charged. If the jury find him guilty, he will be sentenced to fine, imprisonment, penal servitude or death, according to the nature of his offence.

(b) *Civil Proceedings*

Civil proceedings commence with a writ, summons or plaint, which is served on the defendant, so that he may know that he is being sued. This document also tells him in general terms the nature of the claim which is made against him. But it is usually followed by particulars or some other pleading which gives him the details of the plaintiff's cause of action. The defendant must then, as a rule—in the High Court of Justice, at all events (*u*)—state in a second pleading what his defence is. It is from these pleadings that we learn what really are the matters in controversy between the parties, or, as they are called, "the matters in issue." An issue is a definite proposition of law or fact, asserted by one party and denied by the other, which both agree to be the point, or one of the points, which they wish to have decided in the action (*x*).

In cases of any intricacy, the Court will often assist each party to obtain valuable information

(*u*) In most cases in the County Court the defendant need not disclose what his case is until the trial.

(*x*) Odgers on Pleading and Practice, 8th ed., p. 76.

from his opponent before the trial. Thus it will, whenever it is fair to do so, allow one party to administer questions in writing (called interrogatories) to the other, and compel the latter to answer them on oath within ten days. So in a proper case the Court will compel either party to disclose all material documents in his possession or power, and to permit his opponent to inspect and take copies of them. But such steps will only be taken when the Court considers them necessary either for disposing fairly of the action or for saving costs (*y*). A party can also obtain leave to inspect any property, real or personal, in the possession of his opponent, if it is the subject-matter of the action (*z*).

There is no duty whatever on third persons to assist either party by tendering information or producing to him documents or things before the trial (*a*). But any third person within jurisdiction may be compelled by the Court, on payment of his reasonable expenses, to attend at the trial and give evidence under a *subpœna ad testificandum*, and also to bring with him any document specified in a formal notice previously served on him, which is called a *subpœna duces tecum*.

Civil proceedings are tried by a judge either with or without a jury. In the majority of cases either party, if he applies in time, can obtain a jury, special or common. But no trial with a jury takes place in the Chancery Division of the High Court.

(*y*) Order XXXI., rr. 2 and 12.
(*z*) Order L., r. 3.
(*a*) See, however, the Bankers' Books Evidence Act, 1879 (42 Vict. c. 11); see *post*, pp. 320–2.

The trial generally begins with the opening speech of the plaintiff's counsel, in which he states in chronological order the facts on which the plaintiff relies. He then calls his witnesses who are examined on oath, and then as a rule are cross-examined by his opponent, and sometimes re-examined by himself. At the close of this evidence, if the defendant calls no witnesses, the plaintiff's counsel sums up his case. If, however, the defendant wishes to call witnesses, his counsel now addresses the Court and examines his witnesses, who are in turn cross-examined by the counsel for the plaintiff. The general rules of evidence in civil proceedings are substantially the same as in criminal prosecutions. Objections have frequently to be taken by counsel to questions put by his opponent or to something which the witness is endeavouring to say. An objection to the admissibility of any evidence should be taken as soon as it is tendered, otherwise it will be too late. All such objections will at once be decided by the judge. The counsel for the defendant then sums up his case, and counsel for the plaintiff replies.

Now is the time for the learned judge to sum up the case to the jury, if there be one. If there is conflicting evidence on which the jury might reasonably find a verdict for either party, the judge must leave the issue to them; he cannot decide it himself. He may, if he thinks fit, state to them his opinion on the matter; but the jury is not bound to adopt his lordship's view as to any question of fact. They are bound to accept the law as laid down by him; but it is for them to determine the issues of fact

according to their own opinion of the evidence given before them, even though it may be contrary to the opinion which the judge has just expressed.

The jury then gives its verdict, or if the trial is before a judge alone, he announces his decision. Judgment is entered accordingly; and this the successful party may enforce by execution against the property of his opponent.

The law of evidence is part of the *lex fori;* that is to say, it is determined by the law of the place in which the tribunal is situated. To quote the words of Lord Brougham—

"Whether a witness is competent or not, whether a certain matter requires to be proved by writing or not, whether certain evidence proves a certain fact or not, that is to be determined by the law of the country where the question arises, where the remedy is sought to be enforced, and where the Court sits to enforce it" (*b*).

The technical rules of evidence can (when all parties are competent) be dispensed with by consent (*c*). But this does not apply in criminal proceedings, and it may be doubted whether it applies to actions *in rem*.

By s. 3 of the Judicature Act, 1894 (*d*), power was given to the Rule Committee of the Judges of the High Court to make rules for regulating the means by which particular facts may be proved, and the mode in which evidence thereof may be given (a) on applications in matters relating to the distribution of any fund or property, and (b) on any application upon summons for directions pursuant to the rules. The only rule which has been made under this power is Rule 7 of Order XXX., which is that on the hearing of a summons for directions "the Court or a judge may order that

(*b*) *Bain* v. *Whitehaven Rail. Co.*, 3 H. L. Cas. 1.
(*c*) *Baerlein* v. *Chartered Mercantile Bank*, [1895] 2 Ch. 488.
(*d*) 57 & 58 Vict. c. 16.

evidence of any particular fact, to be specified in the order, shall be given by statement on oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries, or otherwise as the Court or judge may direct."

This rule, which applies to the Chancery Division as well as to the King's Bench Division, embodies the only existing power enabling judges of the High Court to dispense with the technical rules of evidence otherwise than by consent (*e*). It is unfortunate that so little use has been made of the valuable power conferred on the Rule Committee by the Act of 1894. When the Commercial Court was established it was at first supposed that this Court would be allowed greater laxity in construing the ordinary rules of evidence; but in *Baerlein* v. *Chartered Mercantile Bank*, LINDLEY, L.J., said (*f*): "The Commercial Court has no more power to dispense with strict evidence, or to depart from the administration of the law in the ordinary way than any other judge or Court. The power to dispense with strict evidence depends entirely upon the Judicature Act of 1894."

Courts-martial must adopt the same rules of evidence as those followed in the Courts of ordinary criminal jurisdiction in England; and therefore no witness before a court-martial can be compelled to answer any question or produce any document which he could not be required to answer or produce in similar proceedings in a criminal Court (*g*). An arbitrator is also bound to follow the legal rules as to the admissibility of evidence, etc. (*h*).

In this Introduction we have endeavoured to state the general principles which underlie the law of evidence without any reference to technical details.

(*e*) *Baerlein* v. *Chartered Mercantile Bank*, [1895] 2 Ch. 488.

(*f*) [1895] 2 Ch. at p. 491.

(*g*) Army Act, 1881, s. 128, and r. 73 of the rules of procedure under that Act. The Criminal Evidence Act, 1898, applies to courts-martial, r. 73B.

(*h*) *In re Enoch and Zaretzky, Bock & Co.'s Arbitration*, [1910] 1 K. B. 327.

Such general principles must be stated broadly; and the reader will understand that to many of them there may be exceptions. All important exceptions will be found stated under appropriate headings in the following pages.

BOOK I.

RELEVANCY.

CHAPTER I.

GENERAL PRINCIPLES.

THE term "evidence," as we have seen, includes all legitimate means, exclusive of mere argument, which tend to prove or disprove any alleged matter of fact, the existence of which is submitted to judicial investigation. It is restricted by lawyers to legal means of proof; they select certain matters which they declare to be admissible, and reject many others which an ordinary citizen would deem material. The matters so admitted are said to be "relevant" or, more fully, "relevant to the issues" in a certain action; for facts which are relevant in one legal proceeding will, as a rule, be irrelevant in another.

The first question, therefore, which a litigant must consider, is—What facts shall I be allowed to lay before the Court on the day of trial? As soon as that is determined, another question will undoubtedly arise—In what way will the Court allow me to prove those facts? These questions are quite distinct, and must not be confused with one another. No one can understand the English law of evidence,

unless he always keeps before him the distinction between Relevancy and Proof.

In this Book, then, we will endeavour to answer the first question: What facts may a party to any given litigation bring before the Court?

The litigant must remember that his case at the trial will be restricted to evidence which bears directly on the matters in issue, and to matters which lead up to and explain that evidence. What are the points in issue can be ascertained from the pleadings, or whatever process takes the place of pleadings? No evidence can be received to prove facts alleged by a party to be material, but not stated or referred to in his pleading (*a*). It is an "absolute necessity that the determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case made thereby" (*b*). Unless, therefore, a fact tendered in evidence has a direct connection with the facts in issue it is irrelevant and will be excluded.

Every fact then is relevant which directly tends to prove or disprove any fact in issue, and also, within certain limits, every fact which indirectly and circumstantially tends to prove or disprove any such fact.

In civil actions, damages, if claimed, are always in issue and consequently every fact is relevant which tends to affect the measure of damage to be applied or the amount of the damages to be awarded. In

(*a*) See *per* MATHEW, J., in *Scott* v. *Sampson*, 8 Q. B. D. at p. 495.
(*b*) *Eshenchunder Singh* v. *Shamachurn Bhutto*, 11 Moo. Ind. App. 20.

criminal proceedings, facts which tend to reduce the seriousness of the offence, and therefore to mitigate the sentence, may be given in evidence before a verdict is taken; but, on the other hand, facts tending to aggravate the sentence, such as a previous conviction (*c*), can, as a rule, only be proved after the jury has found the prisoner guilty.

The evidence must be confined to the points in issue. The law will not permit the parties to wander off into collateral issues; they must keep to the matters in dispute. Anything that either party said or did in the transaction which has caused the dispute is admissible against him, but what he said or did in some other transaction is, as a rule, inadmissible; and the word "transaction" has been defined as "a group of facts so connected together as to be referred to by a single legal name, as a crime, a contract, a wrong, or any other subject-matter of inquiry which may be in issue" (*d*).

Thus the fact that A. gave his friend B. permission to walk across A.'s field is no proof that A. gave C. a similar permission. The fact that A. once committed larceny is no justification for a libel which accuses him of burglary. Nor can a defendant in an action for slander plead "to a statement of claim, alleging that the defendant had said the plaintiff stole a pair of boots, that what the defendant said was that the plaintiff's footman stole the boots, and that was true" (*e*). The fact that A. supplied bad beer to B. is no evidence that the beer which he supplied to C. was also bad, unless both samples of beer were of the same

(*c*) See *post*, p. 120.
(*d*) Stephen, Dig. Law Ev., art. 3.
(*e*) *Per* A. L. Smith, L.J., in *Bassam* v. *Budge*, [1893] 1 Q. B. at p. 577.

brewing (*f*). And where after much discussion two persons ultimately come to an agreement which they reduce into writing, and an action is subsequently brought for the breach of the written agreement, no evidence will be admitted as to the details of the preliminary negotiation; the Court will look solely at the writing, for that contains the only agreement between the parties. If, however, it is alleged that the writing does not correctly state the effect of the oral agreement at which the parties arrived, and an action is therefore brought for its rectification, in that action details as to the preliminary negotiation would be relevant and admissible. "The terms of an antecedent agreement made by parol may be very material in a case where it is a question of the rectification of a written contract on the ground that it does not give effect to the real agreement between the parties, but it is only in such a case that the Court can take such an agreement into consideration" (*g*).

Evidence of other transactions may, however, always be given when its reception will assist the Court by throwing material light upon the transaction in issue.

Thus on an indictment for the forgery of a cheque signed "William Smith," any pieces of paper on which the prisoner has practised writing the words "William Smith," in imitation of the handwriting of the real William Smith, will be admissible as evidence of preparation for the crime. And facts showing a motive for an alleged crime will also be admissible.

So, too, if the question in issue in an action be whether A., who ordered the goods for the price of which the plaintiff is suing, was or was not the agent of B. in that

(*f*) *Holcombe* v. *Hewson*, 2 Camp. 391; Stephen, Dig. Law Ev., art. 10.

(*g*) *Per* COZENS-HARDY, L.J., in *Henderson* v. *Arthur*, [1907] 1 K. B. at p. 13.

behalf, evidence that B. had received and used and paid for other goods ordered by A., either from the plaintiff or from other tradesmen, will be admissible in evidence to show that A. was the defendant's agent. The same rule would apply where A. is the defendant's wife.

Again, acts of ownership by a plaintiff over one portion of a roadside strip (*h*), or of a river bank (*i*), or of a belt of trees (*k*) may be admissible in evidence to show that the plaintiff is also owner of another portion of the same roadside strip, river bank, or belt of trees, if the circumstances of the case be such as closely to connect the two portions.

And where the question in issue was whether at the time when land was purchased the vendor knew that the purchaser was a lunatic, evidence of the conduct of the purchaser in other transactions, both before and after the purchase in question, was held to be admissible to show that his lunacy was obvious and apparent to all with whom he dealt (*l*).

Again, evidence of other transactions will be taken into consideration when it assists the tribunal to judge of the credibility of a witness called before it. A witness is always liable to be cross-examined, not only as to the facts of the case, but also as "to credit" (that is, as to matters not material to the issue) with a view to impugning his credibility and thus shaking his whole testimony. But, in order to prevent the case from thus branching out into irrelevant issues, it is wisely provided that on such matters the answer of the witness must be accepted as final; no evidence can, as a rule, be called to contradict it.

(*h*) *Doe* v. *Kemp*, 2 Bing. N. C. 102; cf. *Dendy* v. *Simpson*, 18 C. B. 831; and see *Leeke* v. *Portsmouth Corporation*, 106 L. T. 627.
(*i*) *Jones* v. *Williams*, 2 M. & W. 326.
(*k*) *Stanley* v. *White*, 14 East, 332; and see *post*, p. 109.
(*l*) *Beaven* v. *M'Donnell*, 10 Ex. 184.

Thus where the prosecutrix on an indictment for indecent assault, which on the facts alleged amounted in substance to an attempt at rape, denied in cross-examination that she had previously had connection with a man other than the prisoner, it was held that her denial could not be contradicted by other witnesses (*m*).

There is, however, an exception. A witness (*n*) can always be asked whether he has not been convicted of a crime and if he either denies the fact, or refuses to answer, the opposite party may prove such conviction, however irrelevant to the issue the fact may be (*o*).

Further, it is a general rule that, whenever the state of mind in which a party did an act is material, anything which that party said or did in any other transaction previous or subsequent is admissible if it throws light on the state of his mind when he did the act in question. For example, evidence of other transactions is admissible to show guilty knowledge (*p*); to show malice (*q*); to show fraudulent intent (*r*); to show that the act was done designedly, and not accidentally or by mistake. This applies even in criminal cases, thus creating an exception to the rule already stated that no evidence will be admitted of the prisoner's bad character, or of other offences alleged to be committed by him, or of other offences of which he has been convicted, until he has been found guilty of the crime for which he is now charged.

(*m*) *R.* v. *Holmes*, L. R. 1 C. C. R. 334; *R.* v. *Gibbons*, 31 L. J. M. C. 98; but see *R.* v. *Riley*, 18 Q. B. D. 481.

(*n*) As to restrictions on cross-examination of a prisoner who has elected to give evidence on oath, see *post*, p. 177.

(*o*) Criminal Procedure Act, 1865 (28 Vict. c. 18), s. 6.

(*p*) *R.* v. *Rhodes*, [1899] 1 Q. B. 77.

(*q*) *Praed* v. *Graham*, 24 Q. B. D. 53.

(*r*) *R.* v. *Cooper*, 1 Q. B. D. 19.

Thus on indictments for coining or uttering false coins the fact that other bad coins were found on the prisoner or that he had on previous occasions passed other bad coins is admissible to show guilty knowledge (*s*). Where a clerk or servant is indicted for embezzling certain specific sums of money from his employer, the fact that constant errors, all in his own favour, appear in the accounts which he delivered has been admitted to show that his omission to hand over to his employer the sums charged in the indictment was intentional, and not accidental (*t*). On a charge of murder by poisoning, evidence that other persons living in the house have also died of or suffered from poisoning is admissible to show that the poison was not administered accidentally (*u*). And in cases of receiving goods knowing them to have been stolen evidence has by statute (*x*) been made admissible that, at the time the proceedings were taken, there was found in the possession of the prisoner other property which had been stolen within the previous twelve months (*y*), and even, on certain conditions, that the prisoner had within the previous five years been found guilty of any offence involving fraud or dishonesty (*z*). But evidence can never be given that the prisoner had a tendency to commit certain crimes or that "the accused is a person likely from his criminal character to have committed the offence for which he is being tried" (*a*).

There are other matters which the Court ordinarily excludes as irrelevant. Anything said or

(*s*) *R.* v. *Jarvis*, 7 Cox, 53.
(*t*) *R.* v. *Cooper*, 1 Q. B. D. 19.
(*u*) *R.* v. *Geering*, 18 L. J. M. C. 215; and see *Makin* v. *Attorney-General*, [1894] A. C. 57.
(*x*) 34 & 35 Vict. c. 112, s. 19, repealed but re-enacted by the Larceny Act, 1916, s. 43 (1) (a) (b), as to which see *post*, p. 117.
(*y*) *R.* v. *Girod*, 22 T. L. R. 720; *R.* v. *Rowland*, [1910] 1 K. B. 458.
(*z*) *R.* v. *Bromhead*, 71 J. P. 103.
(*a*) *Per* Lord Herschell, L.C., in *Makin* v. *Attorney-General*, [1894] A. C. 57; and see *R.* v. *Fisher*, [1910] 1 K. B. 149. For further illustrations, see Book I., Chap. VI., *post*, p. 105.

done by third persons in the absence of a party cannot be put in evidence against him, unless it is necessary to explain the transaction in issue.

A man must not be prejudiced by the words or acts of a third person which he had no opportunity of contradicting or resenting. But the case is different when the act or words which are tendered in evidence were done or spoken in the presence or hearing of the party against whom they are tendered. Such evidence is admissible, not indeed because it is of any great value in itself, but because it leads up to and explains what the party did or did not do thereupon (*b*).

Lastly, evidence of opinion is as a rule excluded; for the tribunal should form its own opinion for itself from the facts alleged and proved before it. Nevertheless, the tribunal must in some cases call for the assistance of experts where the question before it is one as to which special training or special experience is necessary to enable anyone to form an opinion. The cases falling under this principle are discussed in the following chapter.

(*b*) See Book I., Chaps. III. and IV.; and *R.* v. *Christie*, [1914] A. C. 545.

CHAPTER II.

WHAT THIRD PERSONS THINK.

Evidence of Opinion.

WHAT a party thinks or believes at the time he does a material act is often a matter in issue both in civil and criminal proceedings. But what a third person (*i.e.*, someone who is neither a plaintiff, a defendant, nor a prisoner) thinks or believes about any matter in question is generally irrelevant, and therefore inadmissible. If such a third person be called as a witness, he must, as a rule, only state facts; his personal opinion is not evidence. He should be *un oyant et veyant*, a hearer and seer, as the Year Books say.

The object and effect of this general principle is to keep the witness, as far as possible, from trespassing upon the functions of the judge and jury; it is the province of either the judge or the jury to draw all inferences from facts. Cases, however, occur in which special experience or special training is necessary before a true opinion can be formed. In such cases therefore the opinion of those who have had special experience or special training must be laid before the tribunal to enable it to arrive at a correct decision.

In *Carter* v. *Boehm* (*a*), it was a question whether a policy of insurance was vitiated by the concealment of facts which had not been communicated to the underwriters. A broker gave evidence of the materiality of the facts, and stated his opinion that if they had been disclosed the policy would not have been underwritten; but the Court held his statement to be inadmissible.

In cases where the insanity of a person is in issue, a medical witness, whose knowledge of that person is derived solely from hearing the evidence in the case, cannot be asked whether he considers that the patient was insane, for that is the issue for the Court and jury; but he may be asked whether certain symptoms are indications of insanity, and his answers are evidence for the guidance of the Court and jury (*b*). Where, however, a medical witness has examined or attended such a person, he may give his opinion as to the state of mind of the person (*c*).

In *Campbell* v. *Rickards* (*d*), Lord DENMAN said that witnesses conversant with a particular trade were allowed to speak to a prevailing practice in that trade; scientific persons might give their opinions on matters of science; but witnesses were not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced if the parties had acted in one way rather than another.

The general rule which excludes evidence of opinion is based upon the assumption that the Court can, and should, form its own opinion on the facts; hence it does not apply in those cases where the Court itself is not in a position, or

(*a*) 3 Burr. 1905; 1 W. Bl. 593; Cockle, Cases and Statutes on Evidence, 3rd ed., p. 117; but see the note to this case in 1 Sm. L. C., 12th ed., 556; and Arnould Marine Insurance, I. 626.

(*b*) *R.* v. *M'Naghten*, 10 Cl. & F. 200.

(*c*) *R.* v. *Rickards*, 1 F. & F. 87.

(*d*) 5 B. & Ad. 846; and see the decisions of the same learned judge in *Greville* v. *Chapman*, 5 Q. B. 731, and that of GIBBS, C.J., in *Durrell* v. *Bederley*, Holt, 283.

in such a good position as the witness is, to form an opinion, and naturally therefore must rely upon the opinion of the witness.

The matters on which the Court is thus unable properly to form an opinion may be grouped under two heads. First, there are matters on which an opinion cannot properly be formed without special study or experience, matters involving questions of science, art, or skill. Upon such matters the opinion of "experts" is necessarily admitted as evidence. Secondly, there are certain cases where it is naturally impossible for any witness to give direct or positive evidence of facts, cases where he must speak, if at all, as to his opinion or belief, the matters to which he deposes being so essentially matters of opinion, or else so complex or indefinite that the Court is compelled to accept his opinion for what it may be worth. Upon such matters the opinion of non-experts may sometimes be admitted.

I. *Evidence of Experts.*

An expert witness is one who has devoted time and study to a special branch of learning, and thus is specially skilled on those points on which he is asked to state his opinion. His evidence on such points is admissible to enable the tribunal to come to a satisfactory conclusion. He may not only say that he has formed an opinion, but also that he has acted on it, and his having acted on it is a strong corroboration of its correctness (*e*).

An expert may be called to answer questions on

(*e*) *Stephenson* v. *River Tyne Commissioners*, 17 W. R. 590.

any matters of science, art, medicine, architecture, handwriting, valuations, or foreign law—indeed, any matter on which special skill or learning is necessary in order that a reliable opinion may be formed. He need not be a paid professional expert who makes a living by giving such evidence, but he must have devoted sufficient time and study to the subject to make his evidence trustworthy (*f*). The judge decides on the competency of an expert witness; the jury decides the weight of his evidence (*g*).

The evidence of an expert witness differs from that of an ordinary witness in the following respects:—

(a) He can give his opinion, not merely state what took place.

(b) He can detail experiments he made even behind the back of the other party (*h*).

(c) He can cite books of admitted authority (*i*).

(d) He can cite reports of other cases and transactions which throw light on the fact in issue, *e.g.*, for the purpose of showing similarity in symptoms or in results from certain causes. From anyone else such statements would be inadmissible.

Whenever an expert gives evidence as to his opinion, he should in cross-examination be made to state clearly the precise grounds on which his opinion is based.

(*f*) *R.* v. *Silverlock*, [1894] 2 Q. B. 766.
(*g*) *Bristow* v. *Sequeville*, 19 L. J. Ex. 289; 5 Ex. 275; Cockle, 119; *In the Goods of Dost Aly Khan*, 6 P. D. 6.
(*h*) *R.* v. *Heseltine*, 12 Cox, 404.
(*i*) *Nelson* v. *Bridport*, 8 Beav. 527; 10 Jur. 871; *Sussex Peerage Case*, 11 Cl. & F. at pp. 114, 117; 8 Jur. 793; but see *Fowke* v. *Berington*, [1914] 2 Ch. 308.

A medical expert may repeat what a patient said as to his symptoms (*k*), but not what he said as to the facts of the case. An expert is fallible, like all other witnesses, and the real value of his evidence consists in the logical inferences which he draws from what he has himself observed, not from what he merely surmises or has been told by others (*l*). Therefore, in cross-examining him, it is advisable to get at the grounds on which he bases his opinion. Moreover, the evidence of experts must be received with caution, because they are sometimes apt to make themselves partisans and thus diminish the value of their testimony. This matter will be found more fully discussed in Book III. under the head of Cogency (*m*).

In *Palmer's Case* (*n*) it was alleged that the death of Cook had been caused by poison administered to him by Palmer. Expert medical men gave evidence that the circumstances of Cook's decease pointed to poisoning by strychnia. They were not present at the death, and could find few traces in the dead man's corpse of that poison; they based their opinion on the circumstances attending the deaths of three other persons proved to have been poisoned by strychnia, which resembled the circumstances attending Cook's death in almost every particular. The Court admitted the evidence as to the circumstances attending the death of these three other persons; and Palmer was convicted.

The following are the chief matters of "science, art, or skill," upon which opinions to give evidence of their experts have been allowed :—

(a) *Medical Questions.*

Medical men are constantly allowed to give their

(*k*) *Aveson* v. *Lord Kinnaird*, 6 East, 188; Cockle, 69.

(*l*) *Metropolitan Asylum District* v. *Hill*, 47 L. T. 29; *Attorney-General* v. *Nottingham Corporation*, [1904] 1 Ch. 673.

(*m*) See *post*, p. 434.

(*n*) Stephen, Hist. Cr. L., III. 389; Report of Trial of William Palmer (Ward and Lock), 1856.

opinions on such medical questions as the causes of disease and death, the effect of poisons, the nature of wounds, the conditions of gestation, the proper treatment of complaints, the effect of hospitals upon the healthy condition of a neighbourhood (*o*), and upon the sanity or condition of mind of persons (*p*), etc.

(b) *Mercantile, Commercial, and Professional Questions.*

The evidence of commercial and professional men is frequently allowed on matters with which they are peculiarly acquainted. Thus a stockbroker has been allowed to give evidence as to the course of business of bankers (*q*); a grocer's assistant, as to the cause of losses in the grocery trade (*r*); shipowners and merchants, as to the meaning of words in charterparties (*s*); an architect, as to depreciation of property by a nuisance (*t*); an engineer, as to the cause of the choking of a harbour (*u*) or strength and construction of vessels (*x*); an insurance broker, as to the proper method of drawing a policy (*y*); an accountant, as to the manner in which a company should deal with depreciation and profits (*z*); business men, experienced in steel and iron companies, on the same question (*z*); underwriters, as to the materiality of facts in marine insurance (*a*); a person experienced in the business of life insurance, as to the average duration of lives and the value of annuities (*b*); an engineer, as to

(*o*) *Metropolitan Asylum District* v. *Hill*, *supra*; *Attorney-General* v. *Nottingham Corporation*, *supra*.
(*p*) *R.* v. *M'Naghten*, 10 Cl. & F. 200.
(*q*) *Adams* v. *Peters*, 2 Car. & K. 723.
(*r*) *M'Fadden* v. *Murdock*, 15 W. R. 1079.
(*s*) *Robertson* v. *Jackson*, 15 L. J. C. P. 28.
(*t*) *Gauntlett* v. *Whitworth*, 2 Car. & K. 720.
(*u*) *Folkes* v. *Chadd*, 3 Doug. 157; Cockle, 118.
(*x*) *The Robin*, [1892] P. 95.
(*y*) *Chapman* v. *Walton*, 10 Bing. 57.
(*z*) *Bond* v. *Barrow Hæmatite Steel Co.*, [1902] 1 Ch. 353.
(*a*) *Rickards* v. *Murdock*, 10 B. & C. 527; but see *Carter* v. *Boehm*, *ante*, p. 38.
(*b*) *Rowley* v. *London and North Western Rail. Co.*, L. R. 8 Ex. 221.

the effect of a personal injury on the fitness for duty of an engineer (*c*); a builder, as to the safe construction of a staircase (*d*); a surveyor, as to the value of an estate (*e*) or as to the amount of money necessary to put a house into a proper state of repair; a farm valuer, as to the value of crops, stacks, ricks, etc.; an expert in forestry, as to the object with which trees had been planted (*f*); artists, as to the genuineness of pictures or other works of art (*g*); nautical men and Brethren of Trinity House, as to whether the obstruction to a harbour was caused by a neighbouring sea wall (*h*); military officers, as to military practice (*i*); antiquaries, as to ancient handwriting (*k*); and post-office clerks (*l*), and even persons in the habit of receiving letters (*m*), as to post-marks. But the question whether the terms of a covenant in restraint of trade are reasonable is for the judge to decide; the opinion of persons in the trade is inadmissible (*n*).

The evidence of experts is much resorted to in patent cases, and is undoubtedly of great value and assistance to the Court. Thus it is freely admitted to explain the meaning of scientific terms when they occur, and the working of mechanical appliances and what such working will bring about. But expert evidence should not be given on matters which are for the Court and not for any witness, *e.g.*, such questions as whether defendant's article

(*c*) *Johnston* v. *Great Western Rail. Co.*, [1904] 2 K. B. 250.
(*d*) *Crafter* v. *Metropolitan Rail. Co.*, L. R. 1 C. P. 300.
(*e*) *Attorney-General* v. *Cross*, 3 Mer. 524.
(*f*) *Weld-Blundell* v. *Wolseley*, [1903] 2 Ch. 664.
(*g*) *Whistler* v. *Ruskin*, Times newspaper, November 26th and 27th, 1878; *Belt* v. *Lawes*, Times newspaper, December 12th and 16th, 1882.
(*h*) *Folkes* v. *Chadd*, 3 Doug. at p. 159.
(*i*) *Bradley* v. *Arthur*, 4 B. & C. 295—311.
(*k*) *Tracy Peerage Case*, 10 Cl. & F. 191.
(*l*) *Abbey* v. *Lill*, 5 Bing. 299.
(*m*) *Woodcock* v. *Houldsworth*, 16 M. & W. 124.
(*n*) *Haynes* v. *Doman*, [1899] 2 Ch. 13; *Dowden* v. *Pook*, [1904] 1 K. B. 45.

is an infringement (*o*) and what is the construction to be placed on a specification (*p*).

In trade mark and passing off cases, the rules governing the admissibility of evidence of experts as to whether the thing in question was or was not likely to deceive purchasers have not always been the same, but a witness who is in the trade, and who is familiar with the subject matter concerned may be asked whether he himself would be misled (*q*).

At first such evidence was freely admitted (*r*), but after the decisions in *North Cheshire, etc., Brewery Co.* v. *Manchester Brewery Co.* (*s*) and *Payton* v. *Snelling* (*t*) it was rejected on the ground that it usurped the functions of the judge, because in effect it decided the very question which he had to try. Latterly, however, the practice has been altered (*u*); and it now seems settled that the evidence of experts on the point is admissible, in order to aid the judge in coming to a decision on the issue which it is for him, and not the witness, to decide.

(c) *Handwriting.*

This is a matter which is not confined to the evidence of experts, but one on which non-experts who are acquainted with the handwriting are allowed to testify. There are various admissible ways of proving handwriting. Thus it may be proved—

(*o*) *Per* Lord RUSSELL, C.J., in *Brooks* v. *Steele and Currie*, 14 R. P. C. 73; cf. *Seed* v. *Higgins*, 8 H. L. Cas. 550.

(*p*) See the remarks of SMITH, L.J., in *Gadd* v. *Mayor of Manchester*, 9 R. P. C. 530, and of NEVILLE, J., in *Crosfield* v. *Techno-Chemical Laboratories*, 29 T. L. R. 378.

(*q*) *Per* LOREBURN, L.C., in *Claudius Ash, Sons & Co., Ltd.* v. *Invicta Manufacturing Co.*, 29 R. P. C. 465.

(*r*) *Orr-Ewing* v. *Johnson*, 7 App. Cas. 219.

(*s*) [1899] A. C. 83.

(*t*) 17 R. P. C. 635; and see *Hennessy* v. *Dompè*, 19 R. P. C. at p. 339; *Lambert* v. *Goodbody*, 19 R. P. C. 377.

(*u*) *Birmingham S. A. Co.* v. *Webb*, 24 R. P. C. 27; *Hennessy* v. *Keating*, 25 R. P. C. 125; and see *L. G. O. Co.* v. *Lavell*, [1901] 1 Ch. 135; and *In re Joseph Crosfield & Sons, Ltd.*, [1910] 1 Ch. 118 (affirmed at p. 130).

1. By the party who wrote or signed the document in question. This is the most satisfactory evidence.

2. By a witness who actually saw the party write or sign the document.

3. By a witness who has seen the party write on other occasions, or even on one occasion only (*x*), and who can swear to his *belief* that the writing produced was written by that person. It is not sufficient for him to swear merely that he *thinks* that it is (*y*).

4. By a witness who has seen documents, purporting to be written by the party, which, by subsequent communications with such party, he has reason to believe to be written by him (*z*).

5. By a witness who has formed his opinion as to the authenticity of a disputed document by comparing its handwriting with that of any document which has been admitted or proved, to the satisfaction of the judge, to be the genuine writing of the party (*a*). Such a witness must be skilled in comparing handwritings, but he need not be a professional expert. Thus in *R.* v. *Silverlock* (*b*) a solicitor who had given considerable study and attention to handwriting was held a competent witness. But a person is not entitled to give evidence as an expert in handwriting if his only knowledge on the subject is acquired in the course of a case (*c*). The jury (or, if there is no jury, the judge) may compare the documents and form their own opinion without the assistance of any expert.

Evidence given under the first two heads above is, of course, not evidence of opinion at all; evidence under the other three heads is opinion merely. But it is

(*x*) *Garrells* v. *Alexander*, 4 Esp. 37; *Willman* v. *Worrall*, 8 C. & P. 380; *R.* v. *Rickard*, 119 L. T. 192.

(*y*) *Eagleton* v. *Kingston*, 8 Ves. 438, 473.

(*z*) *R.* v. *Slaney*, 5 C. & P. 213: "A clerk in a merchant's office who has corresponded with the defendant on his master's behalf may be called to prove the defendant's handwriting;" and see *R.* v. *Turner*, [1910] 1 K. B. at pp. 357, 358; and *In re Clarence Hotel*, 54 Sol. Jo. 117.

(*a*) 28 Vict. c. 18, s. 8.

(*b*) [1894] 2 Q. B. 766.

(*c*) *R.* v. *Rickard*, 119 L. T. 192.

convenient to treat the whole matter together. The usual method in cases which fall under the third and fourth heads is for the party calling the witness, or his counsel, merely to ask the witness, "Are you acquainted with the handwriting of —— ?" (the person in question), leaving the other side to cross-examine as to the extent of his acquaintance with it. Such cross-examination can only weaken the force of his evidence, not destroy its admissibility (*d*).

Where it is desired to prove the handwriting of an ancient document, it may be proved by the evidence of a witness who has, in the course of business, examined documents admitted to be written by the same party, but not by a witness who has merely inspected such documents for the purpose of giving evidence (*e*).

The principles which guide the Courts in this matter are well illustrated by the remarks of PATTESON, J., in *Doe* v. *Suckermore* (*f*). He said:—

"All evidence of handwriting, except where the witness sees the document written, is in its nature comparison. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind derived from some previous knowledge. That knowledge may have been acquired either by seeing the party write, in which case it will be stronger or weaker according to the number of times and the periods and other circumstances under which the witness has seen the party write; but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such cases) even if he has seen him write but once, and then merely signing his surname (*g*); or the knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards personally communicated with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers producing further correspondence or acquiescence by the party in some matter to which they relate, or by any other mode of communication between the party and the witness, which, in the ordinary course of transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party; evidence

(*d*) *Eagleton* v. *Kingston*, *supra*; *R.* v. *Horne Tooke*, 25 How. St. Tr. 71.

(*e*) *Fitzwalter Peerage Case*, 10 Cl. & F. 193; but see 28 Vict. c. 18, s. 8, *post*, p. 47.

(*f*) 5 A. & E. 703; Cockle, 327.

(*g*) *Lewis* v. *Sapio*, 1 M. & M. 39.

of the identity of the party being of course added *aliunde*, if the witness be not personally acquainted with him. These are the only modes of acquiring a knowledge of handwriting which have hitherto, as far as I have been able to discover in our law, been considered sufficient to entitle a witness to speak as to his belief in a question of handwriting. In both the witness acquires his knowledge by his own observation upon facts coming under his own eye, and as to which he does not rely on the information of others; and the knowledge is usually, and especially in the latter mode, acquired incidentally, and, if I may say so, unintentionally, without reference to any particular object, person, or document."

The above passage accurately states the common law; but statutory provisions have been engrafted upon it of which the following is the one now in force both in civil and criminal cases: "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute" (*h*).

Before any writing is admissible as a standard of comparison, its genuineness must be proved to the satisfaction of the judge; it need not be relevant to the issue (*i*). Letters, written by the defendant, not otherwise evidence in the cause, were held admissible as evidence that the libel, which contained the plaintiff's name spelt with the same peculiarity, was written by the defendant (*j*). So it was held that, in order to prove by comparison that the defendant was the writer of a libellous letter, he might be interrogated as to whether he was the writer of another letter to a third person, as "the plaintiff would clearly have a right to put another document into the defendant's hand, and ask him if that was in his handwriting" (*k*).

So, where an attesting witness swore clearly and distinctly that a deed was executed in his presence by R. and

(*h*) 28 Vict. c. 18, s. 8.
(*i*) *Birch* v. *Ridgway*, 1 F. & F. 270.
(*j*) *Brookes* v. *Titchborne*, 5 Ex. 929.
(*k*) *Jones* v. *Richards*, 15 Q. B. D. 439, 440; Odgers on Libel and Slander, 5th ed., 658.

his wife, both of whom he knew, this evidence was held not to be counterbalanced by the evidence of experts who expressed an opinion that the signature purporting to be that of R. was not in the character of his handwriting (*l*).

The fact that a document is, under a particular statute, provable by a copy, does not exempt the person tendering it from proving that the original is in the proper handwriting (*m*). If a person, whose handwriting is in question, be present in court, he may, it seems, be then and there required to write something which the Court and the jury may compare with the document in dispute (*n*).

The evidence of handwriting experts must, like all evidence of experts, be received with caution, perhaps with greater caution than evidence of experts on other matters (*o*).

(d) *Foreign Law.*

The Court will not take judicial notice of the laws or customs of foreign States, but such laws must be proved by skilled witnesses in the same way as any other facts (*p*).

In England, Scotch law and the laws of the colonies are regarded as foreign; but the House of Lords takes judicial notice of the former and the Privy Council of the latter.

No witness will be competent to prove foreign law unless he appear to have filled an official position, or to be a practising member of the legal profession, or to have been in some position in which it is probable that he would have acquired a practical acquaintance with

(*l*) *Newton* v. *Ricketts*, 9 H. L. Cas. 262.

(*m*) *Auriol* v. *Smith*, 18 Ves. 198.

(*n*) *Doe* d. *Devine* v. *Wilson*, 10 Moo. P. C. 502, 530; *Cobbett* v. *Kilminster*, 4 F. & F. 490.

(*o*) See *post*, Book III., "Cogency."

(*p*) By 24 & 25 Vict. c. 11, s. 1, the Courts are empowered to remit a case to a Court of any foreign State to ascertain the law of such State, if a convention has been entered into with such State. But apparently no use has yet been made of this statute. See also *post*, pp. 131—133.

the law in question (*q*). In *The Sussex Peerage Case* (*r*), a Roman Catholic bishop in England was called to give evidence as to the law of marriage at Rome. It appeared that it was part of his official duties to decide for spiritual purposes questions as to the validity of marriages between Roman Catholics, and that for this purpose he had to apply the law of Rome. It was held that his evidence was admissible, as he was engaged in the performance of important and responsible public duties, and that in order to discharge them properly he was bound to make himself acquainted with the law in question. A London hotel-keeper who formerly carried on business as a merchant and commissioner of stocks at Brussels was allowed to prove what the usage in Belgium is as to the presentment of promissory notes there (*s*). And the certificate of a foreign ambassador, under the seal of the legation, has been held evidence of the law of the country by which he was accredited (*t*). A person who has acquired, by study in one country, a merely theoretical knowledge of the laws of another country is not competent to prove the laws of such other country (*u*). Thus, in *In re Turner* (*x*), KEKEWICH, J., expressed "a strong opinion, which he thought was shared by JOYCE, J., that a man who acquired knowledge of the law of a particular country merely by study was not competent to give evidence as an expert on that law; it was essential that he should be a professional man, or should hold some official position, in the State in question. Certainly he thought that study alone was no sufficient qualification." A legal practitioner, practising before the Privy Council, is not an expert qualified to give evidence in the laws of those countries for which

(*q*) *Vander Donckt* v. *Thellusson*, 8 C. B. 812.
(*r*) 11 Cl. & F. 134.
(*s*) *Vander Donckt* v. *Thellusson*, *supra*.
(*t*) *In the Goods of Klingeman*, 3 S. & T. 18.
(*u*) *Bristow* v. *Secqueville*, 5 Ex. 275; Cockle, 119; *In the Goods of Bonelli*, 1 P. D. 69.
(*x*) [1906] W. N. at p. 27.

the Privy Council is the ultimate Court of Appeal (*y*). But in one case the affidavit of an English solicitor and notary, practising in London, who stated that he had for many years had practice and experience in the laws of Chili, was accepted as evidence of the laws of that country in a probate action (*z*).

Foreign law cannot be proved in England, as it can in some countries, by books printed or published under the authority of the Government of a foreign country, and purporting to contain the statutes, code, or other law of such country, nor by printed or published books of reports of decisions of the Courts of such country, nor by books proved to be commonly admitted in such Courts as evidence of the law of such country (*a*). A witness called to prove foreign law may, however, refer to laws or treatises of authority to aid his memory; and, if the witness states that any text-book, decision, code, or other legal document truly represents the foreign law which he is called to prove, the Court may look at the treatise and treat it and give effect to it as part of the testimony of the witness (*b*). A question of foreign law, being one of fact, must in every action be decided on evidence adduced in that action, and not by a previous decision, or on evidence adduced in another action (*c*).

II. *Evidence of Opinion by Non-Experts.*

There is a second class of cases in which evidence of opinion is admissible; and it may be given by persons who are not experts as well as by experts.

(*y*) *Cartwright* v. *Cartwright*, 26 W. R. 684.

(*z*) *In the Goods of Whitelegg*, [1899] P. 267; and see *Wilson* v. *Wilson*, [1903] P. 157.

(*a*) *Sussex Peerage Case*, 11 Cl. & F. at p. 134.

(*b*) *Concha* v. *Murrietta*, 40 Ch. D. at p. 554; but see the judgment of FARWELL, J., in *In re Johnson*, [1903] 1 Ch. at p. 831.

(*c*) *M'Cormick* v. *Garnett*, 5 De G. M. & G. 278; and see the remarks of Lord DENMAN, C.J., in *Baron de Bode's Case*, 8 Q. B. at p. 250; and of Lord CHELMSFORD, in *Di Sora* v. *Phillipps and others*, 10 H. L. Cas. at pp. 636 and 639.

Such cases occur when direct or positive evidence of facts is practically unattainable and the witnesses must therefore speak, if at all, as to their opinion or belief.

Thus, on questions of identity, appearance, or age, condition or resemblance, of persons or things, and the like, evidence of opinion or belief is generally admitted, as such matters are essentially matters of opinion, and as a rule no witness can swear positively as to them.

For instance, in the case of *Fryer* v. *Gathercole* (*d*), a witness was called to identify a certain pamphlet. She swore that she "believed" the document produced to be that in question, but she could not swear positively that it was so. It was held that this was sufficient evidence of identification of the pamphlet.

Again, evidence as to whether a man was or was not drunk on a particular occasion may be freely given by anyone who saw him on that occasion.

And, as we have already seen (*e*), evidence may be given as to the handwriting of a document by persons who are not professional experts.

If the age of any person is an essential element in the definition of any particular crime (as in the case of offences against the Criminal Law Amendment Act, 1885) the age must be proved strictly—*i.e.*, by the production of a certificate of birth, accompanied by parol evidence positively identifying the prosecutrix with the person whose birth is registered in the certificate (*f*). But in many cases a person's belief as to the age of another will be admitted. Thus, on the trial of an indictment for unlawfully and wilfully neglecting children, contrary to the Prevention of Cruelty to Children Act, 1894, the children were not produced before the Court, and the only evidence as to their ages was that of two persons who said

(*d*) 13 Jur. 542; Cockle, 121.
(*e*) *Ante*, p. 44.
(*f*) *R.* v. *Rogers*, 111 L. T. 1115.

that they had seen the children and stated what they believed were their respective ages, and that of the mistress of a school who said that the elder children attended a public elementary school, and she believed they were within the statutory age limit; it was held that there was evidence proper to be left to the jury that the children were under sixteen (*g*). It must not however be overlooked that the Act under which the proceedings in this case were taken contained an express provision (s. 17) that if "the child appears to the Court to be under" the age of sixteen "such child shall for the purposes of this Act be deemed to be under that age, unless the contrary is proved."

(*g*) *R.* v. *Cox*, [1898] 1 Q. B. 179.

CHAPTER III.

WHAT THIRD PERSONS DID OR SAID BEHIND THE BACK OF A PARTY.

WHAT other persons did or said in the absence of a party is, as a rule, inadmissible as evidence against that party (*a*). It would be unfair that a man should be prejudiced by what takes place behind his back, as he cannot contradict or explain what is so said against him or prevent what is so done.

To this general rule there are however exceptions. What a person did will be received more readily than what he wrote or said, provided that it directly leads up to or explains the matter in issue, or is otherwise sufficiently connected with it. The Court regards a man's acts rather than his words (*b*). Hence this chapter is divided into two sections, which deal respectively with what third persons did and with what third persons said; and in the word "said" is included anything printed or written.

I. WHAT THIRD PERSONS DID.

Events that occurred behind the back of a party cannot, as a rule, be given in evidence against him,

(*a*) By "a party" is here meant in a civil case either the plaintiff or the defendant; in a criminal case the prisoner but not the prosecutor.

(*b*) *Re Steer*, 3 H. & N. 594; and see the judgment of POLLOCK, C.B., in *Bruce* v. *Nicolopulo*, 3 W. R. 483.

unless they clearly lead up to or explain some matter in issue, or are otherwise so connected with it that an inference can reasonably be drawn from them respecting the matter in issue.

Many instances can be found in the books which illustrate this general proposition. As BLACKBURN, J., says in *Castrique* v. *Imrie* (*c*), "a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forgery in an action on the bill, though the conviction must have proceeded on the ground that the bill was forged." But where a man is arraigned for stealing goods, the fact that the prosecutor left the goods safe and sound in their proper place an hour before they were stolen would be admissible. So also would the fact that the prosecutor marked certain coins behind the back of his shopman, in whose pocket they were subsequently found.

Thus, on a prosecution for receiving goods knowing them to be stolen, the original theft must be proved against the receiver just as strictly as if the thief were being tried for larceny, but by such evidence only as is admissible against the receiver. Anything which the thief said behind the back of the receiver is inadmissible against the latter. Any confession of guilt made by the thief when charged with the crime will be excluded (*d*); and the jury must disregard the fact that, as sometimes happens, they have just heard the thief plead guilty to the larceny. It is, however, open to the prosecution to call the thief as a witness on this issue, as on all others. If under examination on the trial of the receiver the thief admits his guilt in the witness-box, this is some evidence to go to the jury; but, if uncorroborated, it is entitled to little weight; and it is the duty of the judge to warn the

(*c*) L. R. 4 H. L. at p. 434.
(*d*) *R.* v. *Smith*, 18 Cox, 470.

jury that it is unsafe to convict the receiver on the uncorroborated evidence of the thief (*e*).

In *Spargo* v. *Brown* (*f*), the question was, whether the plaintiff was tenant to the defendant, Hugh Brown, who had levied a distress for rent alleged to be owing, or to his brother John Brown. The plaintiff had paid rent to John, but the defendant, to show that the money had been paid to John as his (the defendant's) agent, offered in evidence accounts rendered to him in that capacity by John. It was objected that John Brown, not being dead, ought to have been called as a witness. The judge rejected the evidence on this ground, and the full Court upheld his ruling. "The general rule is, that where a person is living, and can be called as a witness, his declaration, made at another time, cannot be received in evidence," for "every material fact must be proved on oath. There is an exception to that rule, viz., that the declarations of a party to the record, or of one identified in interest with him, are, as against such party, admissible in evidence; but, generally speaking, mere declarations not upon oath are not evidence."

On the same principle, it was held by the judges in the Exchequer Chamber in *Wright* v. *Doe* (*g*), that letters written to the testator by different persons since deceased, and who had been well acquainted with the testator, could not be received in evidence on a question of his sanity. The Court held that the letters were not receivable as mere declarations of deceased witnesses, or as proof of treatment, but that they would have been admissible if they were connected with any act of the testator relating to them by which intelligence was indicated, as, for example, if he had answered them.

Again, the conduct, intention, or course of

(*e*) *R.* v. *Robinson*, 4 F. & F. 43; *R.* v. *Tute*, [1908] 2 K. B. 680 and see *post*, p. 451.

(*f*) 9 B. & C. 935; and see *In re Holland*, [1902] 2 Ch. 379.

(*g*) 4 Bing. N. C. 489; Cockle, 72; affirmed by the House of Lords, 5 Cl. & F. 670.

dealing between two parties cannot be shown by evidence of the conduct, intention, or course of dealing, or of similar transactions, between one of them and a third party; still less of transactions between entirely different parties (*h*). Such evidence is said to be *res inter alios acta*, and will be rejected as irrelevant to the issue, unless it is so intimately connected with the transaction that it throws light upon the question at issue (*i*). The fact that A. contracted or dealt in a particular manner with B. is no evidence that he meant to contract or deal in the same manner with C.

Thus, in an action for goods sold and delivered, in which the defence is that the plaintiff sold them to the defendant on certain terms, the defendant cannot show that the plaintiff had sold the same quality of goods to other persons on such terms, for the fact that a man has once or more acted in a particular way does not make it probable that he so acted on the occasion in question (*k*). But where in an action for work done to some houses the defendant denied that he was personally interested in the property, the plaintiff was allowed to call other persons as witnesses who had done work or supplied materials on the personal order of the defendant to and for those houses (*l*).

Where the issue was whether the plaintiff, a tradesman, had given credit to A.'s father, evidence that other tradesmen had given credit to the father was rejected (*m*). So, the terms on which one tenant holds are no evidence of the terms on which another tenant holds under the same

(*h*) *Kent* v. *Fittall* (No. 3), [1909] 1 K. B. 215.
(*i*) *Milne* v. *Leisler*, 7 H. & N. 786.
(*k*) *Hollingham* v. *Head*, 4 C. B. (N.S.) 388; cf. *Howard* v. *Sheward*, L. R. 2 C. P. 148.
(*l*) *Woodward* v. *Buchanan*, L. R. 5 Q. B. 285.
(*m*) *Smith* v. *Wilkins*, 6 C. & P. 180.

landlord (*n*). In an action for slander alleging maltreatment of boys at a school, evidence of the treatment of boys at other schools, offered to prove what is proper treatment, was rejected (*o*). An award in favour of a party to a former action is not evidence for a party to a subsequent action, claiming by paramount title, as against a party who claims through the person against whom the award was made (*p*). The decision of a coroner's jury as to the cause of a person's death cannot be given in evidence where the same issue is raised in a subsequent legal proceeding (*q*). In an action to recover money paid to a third person, the receipt given by the latter to the plaintiff is not *per se* evidence against the defendant (*r*).

Evidence of an act between third persons will however be received whenever it is either connected presumptively with the party who is to be affected by it, or is invested with a *primâ facie* relevancy by evidence of an original unity of nature or title. Unless some such privity or connection is first proved extrinsically, the transactions of third persons are inadmissible (*s*).

Thus a plaintiff suing for personal injuries can prove that other accidents had occurred at the same place in order to show its dangerous character (*t*). The defendant, to rebut this inference, can also show that in places exactly similar no accidents had occurred (*u*).

Again, a custom of trade may sometimes be proved

(*n*) *Carter* v. *Pryke*, Peake, 95.

(*o*) *Boldron* v. *Widdows*, 1 C. & P. 65; and see *Delamotte* v. *Lane*, 9 C. & P. 261.

(*p*) *Wenman* v. *Mackenzie*, 5 E. & B. 447.

(*q*) *Bird* v. *Keep*, [1918] 2 K. B. 692.

(*r*) *Carmarthen and Cardigan Rail. Co.* v. *Manchester and Milford Rail. Co.*, L. R. 8 C. P. 685.

(*s*) *Per* Maule and Bosanquet, JJ., in *Taylor* v. *Parry*, 1 M. & G. 614; *Petrie* v. *Nuttall*, 11 Ex. 569.

(*t*) *Moore* v. *Ransome*, 14 T. L. R. 539.

(*u*) *Manning* v. *London and North Western Rail. Co.*, 23 T. L. R. 222; cf. *Folkes* v. *Chadd*, 3 Doug. 157.

by showing what is the custom of the same trade in a different place, *e.g.*, evidence of the custom of fisheries off Newfoundland was held to be evidence of the custom of similar fisheries off the coast of Labrador which had been recently annexed to Newfoundland (*x*). So evidence of a usage in the London colonial market, which makes a broker contracting on behalf of an undisclosed principal personally liable unless he discloses his principal within three days from the date of the contract, has been admitted as relevant to show a similar custom in the London fruit trade, on the ground that it was evidence of a usage in a closely allied trade in the same place (*y*). And parish books were held to be evidence of the practice of the parish against a member of the vestry, although they related to proceedings of the vestry before he became a member (*z*).

The customs of one manor are not, as a rule, evidence of the customs of another manor (*a*). But such evidence may be admitted on proof that the two manors were once united. Such proof may be afforded by showing that they belong to the same lord, that the same description of tenants has existed in each, and that their leases have been granted in the same terms. In such a case, the usage which has prevailed in one part, and which is therefore evidence to explain the meaning of a grant there, is evidence to explain a grant expressed in similar terms as to any other part of the old manor (*b*); but the unity or original identity of the manors must be clearly shown, and the mere fact of their being in the same leet, or parish, is not sufficient (*c*).

Where a letter from the defendant, in answer to a letter written on the plaintiff's behalf, was proved to have been seen by the plaintiff, it was admitted in evidence against him.

(*x*) *Noble* v. *Kennoway*, 2 Doug. 510.
(*y*) *Fleet* v. *Murton*, L. R. 7 Q. B. 126.
(*z*) *Cooper* v. *Ward*, 6 C. B. (N.S.) 50.
(*a*) *Marquis of Anglesea* v. *Lord Hatherton*, 10 M. & W. 233.
(*b*) *Per* BAYLEY, J., in *Rowe* v. *Brenton*, 8 B. & C. 764.
(*c*) *Per* Lord ABINGER, 10 M. & W. 236.

In *Clifford* v. *Timms*, articles of partnership between plaintiff and defendant, who were dentists, provided that either of them could give the other notice in writing to dissolve the partnership, if that other should at any time during the continuance of the partnership be guilty of professional misconduct. The defendant gave plaintiff notice in writing, and plaintiff brought his action for a declaration that the notice was void and that the partnership still subsisted, and for an injunction. The defendant offered, in justification of his notice, as evidence, an order of the General Medical Council made under the Dentists Act, 1878, directing the Registrar to erase the plaintiff's name from the Dental Register on the ground that it had been proved to their satisfaction that he had been guilty of conduct which was infamous or disgraceful in a professional respect. He also offered as evidence the report of the Dental Committee as to plaintiff's conduct upon which the order had been based. The Court of Appeal decided that the order (and apparently the report) was admissible, the order being considered in the light of an inquisition or judgment *in rem*, as the General Medical Council had committed to them by statute the sole right of adjudicating on such matters (*d*). The decision of the Court of Appeal was subsequently affirmed in the House of Lords but on different grounds (*e*). But it must be observed that this decision lays down no general rule as to judgments between private individuals in any matter of ordinary private concern. Such a judgment, obtained against A., is not admissible in a subsequent action against B.

On the other hand, whenever proceedings which relate to a matter of public interest have been brought in any Court which has jurisdiction in the matter, the judgment, decree, or inquisition of that Court is admissible against all persons as evidence, although it is not conclusive as against those who were not parties to the proceedings.

Thus, in an action for trespass to a several fishery in a

(*d*) [1907] 2 Ch. 236.
(*e*) [1908] A. C. 12.

navigable tidal river, the defendants justified on the ground that the public had the right of fishing. As evidence of possession and user the plaintiff tendered (*inter alia*) the proceedings and decree in 1687 in a "possessory suit" brought in the Court of Chancery in Ireland by C. (the plaintiff's predecessor in title) against strangers to the present action, by which decree an injunction was awarded to quiet C. and his under-tenants in such possession of their fishing as they had at the time of exhibiting the bill, and three years before, to continue until evicted by due course of law, both parties being at liberty to take proceedings at law against each other in order to ascertain their titles. It was held that, as the decree was a solemn and final adjudication and not collusive, and as it could not have been made except upon proof of unbroken user and enjoyment for at least three years before the bill, inconsistent with any actual exercise at that time of a public right of fishing, the proceedings and decree were admissible (*f*). And a verdict against one defendant in trespass upon an issue of a justification of a public right of way, negativing such right, is evidence in trespass for breaking and entering the same close against another defendant who justifies under the same right (*g*). The right claimed by both defendants being the same public right, both stood in the same relation to the plaintiff.

Certain judgments of our Courts are called "judgments *in rem*" (*h*); these are conclusive on everybody and therefore admissible in evidence against everybody, whether they took part in or were present at the proceedings or not. "Judgments *in personam*" on the other hand bind only the parties to the proceedings and their privies, and are not admissible in evidence against any one else.

(*f*) *Neill* v. *Duke of Devonshire*, 8 App. Cas. 135.
(*g*) *Reed* v. *Jackson*, 1 East, 355.
(*h*) As to what are "judgments *in rem*," see *post*, pp. 389—391.

II. What Third Persons said.

Any statement made by a third person behind the back of a party is not, in general, admissible against him; it would be unfair that he should be in any way prejudiced by words which he had no power to contradict or explain. But to this rule there are several exceptions.

(i.) *Words accompanying a Material Act.*

Words accompanying a material act done behind the back of a party are admissible in evidence against him when such act is itself admissible, and the words in fact form part of the same transaction. The words must strictly accompany the physical act, and be uttered at the time the material act is done, or so shortly before or so shortly after it that they may fairly be described as part of the same transaction. So long as the words do thus accompany the acts, it is not material who used the words; it may be the doer of the physical act, the person to whom the act is done, or an onlooker.

Thus, as long ago as 1692, in *Thompson and wife* v. *Trevanion* (*i*), which was an action for an assault committed by the defendant on the female plaintiff, Holt, C.J., decided that "what the wife said immediately upon the hurt received, and before that she had time to devise or contrive anything for her own advantage, might be given in evidence." Again, in *R.* v. *Fowkes* (*k*) a man was shot in a room; his son, who was in the room at the time, saw

(*i*) Skinner, 402; Cockle, 65.
(*k*) Stephen, Dig. Law Ev., art. 3.

the prisoner look in at the window immediately before the shot was fired, and at once called out, "There's Butcher," (that being the name by which the prisoner was known). At the trial the son was permitted to state not only that he saw the prisoner, but what he cried out, although the prisoner was not near enough to hear the exclamation.

In the case of *R.* v. *Foster* (*l*), where the prisoner was tried for the manslaughter of a man by driving over him with a cabriolet, a carter, who was passing at the time was allowed to give in evidence what the dying man said. It was held by GURNEY, B., that "what the deceased said at the instant as to the cause of the accident was clearly admissible."

However, in *R.* v. *Bedingfield* (*m*), where a man was tried for murdering the woman he lived with, and the defence was suicide, and evidence was tendered that the woman rushed out of the room which she occupied with the prisoner with blood streaming from her throat, and cried out, "See what Harry has done," this statement was held inadmissible by COCKBURN, C.J., on the double ground that (a) it was not part of the *res gestæ*, inasmuch as her statement was made after she had come out of the room in which her throat was cut, and (b) it was not a dying declaration, inasmuch as, though she was obviously dying at that moment, she had no time to think she was, and consequently made her statement without that absence of hope of recovery and absolute belief in impending death which the law accepts as the sole substitute for the solemnity of an oath (*n*). This decision was much discussed and criticised (*o*), although it does not appear to have been judicially dissented from, but it is not inconsistent with any of the previous cases, as there was no evidence to show how long an interval had elapsed between the murderous act and the exclamation uttered by the victim.

(*l*) 6 C. & P. 325; Cockle, 67.
(*m*) 14 Cox, 341; Cockle, 66.
(*n*) See *post*, p. 70.
(*o*) Stephen, Dig. Ev., art. 3; Taylor, 412, 509; Phipson, 46.

It was not cited in *R.* v. *Gibson* (*p*), in which a conviction of Quarter Sessions was quashed by the Court for Crown Cases Reserved on the ground that a statement had been wrongly admitted as evidence. The prosecutor, when walking down a street in which the prisoner lived, received a wound from a stone. A lady, who was then passing, said to the prosecutor, pointing to the prisoner's door, "The person who threw the stone went in there." The door was at once broken open and the house entered, and the only persons found inside were the prisoner and his father, who was in a drunken sleep. The prisoner obviously was not present when the lady made this statement, and there was no evidence that he heard it. She was not called as a witness at the trial. Her statement clearly ought not to have been received, as it did not accompany the material act, nor was it part of the transaction. Some little time must have elapsed between the throwing of the stone and the moment when the lady made the statement, as the prisoner had had time to enter his house and fasten the door (*q*).

In an action for false imprisonment, the defendant justified on the ground that he had given the plaintiff in custody for forging a bill of exchange, which had been dishonoured on presentment to the drawee. A witness stated that he had accompanied the defendant to the drawee, who refused to pay. He was then asked what the drawee had said at the time of the refusal. The question was objected to, but the Court held that the evidence ought not to be excluded. There were peculiar circumstances in the case, but TINDAL, C.J., said:—

"Even if the inquiry before us had depended on the determination of the point whether evidence by the defendant of the dishonour of the bill, and of the circumstances attending such dishonour, was relevant to the question then before the jury, it would have been difficult altogether to exclude such evidence on the score of its irrelevancy" (*r*).

(*p*) 18 Q. B. D. 537.

(*q*) See also the judgment of Lord READING, C.J., in *R.* v. *Christie*, [1914] A. C. at pp. 566—8; and in *R.* v. *Curnock*, 111 L. T. 816.

(*r*) *Perkins* v. *Vaughan*, 4 M. & G. 988.

On the same principle, proof has been received of the language uttered by the holders of seditious meetings in order to show the objects and character of such meetings (*s*). In the same way evidence may be given of the inscriptions on flags used at such meetings without producing the flags themselves; for such inscriptions used on such occasions are the public expression of the sentiments of those who bear them, and have rather the character of speeches than of writings (*t*). A foreign proclamation, contained in a printed placard, posted up at Ibraila, was treated as an act done, and was allowed to be proved by an examined copy (*u*). So too, the remarks made by persons looking at a libellous picture are admissible in evidence in an action against the person who exhibited it (*x*).

In an action brought by the assignees of a bankrupt for goods, the property of the bankrupt, letters written by him during his absence from home, stating that he was absent to avoid two writs that were out against him, were held admissible evidence for the plaintiffs of an act of bankruptcy, without proof that there was in fact any writ issued, or any pressure of creditors. It was said in the same case that, in order to make a declaration of a bankrupt admissible evidence of an act of bankruptcy, it is not essential that the declaration and the act should be contemporaneous (*y*). But this was a mere *obiter dictum*, as the question did not really arise in the case, because the act "was a continuous act, and the letter was written during its continuance."

Statements by a deceased vendor as to the property sold, made at the time of a sale, are evidence for its subsequent identification (*z*). For the declaration of a tenant for life to be evidence against the remainderman,

(*s*) *R.* v. *Hunt*, 3 B. & Ald. 574.
(*t*) *R.* v. *Lord George Gordon*, 21 How. St. Tr. 535.
(*u*) *Bruce* v. *Nicolopulo*, 3 W. R. 483.
(*x*) *Du Bost* v. *Beresford*, 2 Camp. 511.
(*y*) *Rouch* v. *Great Western Rail. Co.*, 1 Q. B. 51. See also *Rawson* v. *Haigh*, 2 Bing. 99; Cockle, 68.
(*z*) *Parrott* v. *Watts*, 47 L. J. C. P. 79.

it must be accompanied by an act done by the tenant for life; an act done by a third person is not sufficient (*a*).

Notwithstanding the rule that a parent cannot bastardise his child, on an issue as to the legitimacy of the plaintiff, a witness was allowed to state the declaration and conduct of the deceased mother, when questioned about her child's parentage (*b*). And the letters of a living mother were admitted as part of the *res gestæ* on a question of legitimacy of the child; evidence of her acts and conduct being admissible on this question, although, of course, she could not have given such evidence in the witness-box (*c*).

(ii.) *Acts of Conspirators, etc.*

Where it has been already proved that two or more persons are engaged in a joint enterprise (such as a criminal conspiracy, the commission of a joint tort, the making of a joint contract, etc.), anything said or done by one of them in furtherance of their common purpose is admissible against the others, although such others were not present when the words were spoken or written or the act done.

The conspiracy or agreement among several to act in concert together for a particular end must be established by proof before any evidence can be given of acts done or words spoken behind the back of the person against whom the evidence is tendered.

Where several persons are proved to have been engaged in a conspiracy, all the transactions of that conspiracy by

(*a*) *Howe* v. *Malkin*, 27 W. R. 340.
(*b*) *Hargrave* v. *Hargrave*, 2 Car. & K. 701.
(*c*) *The Aylesford Peerage Case*, 11 App. Cas. 1; and see *The Poulett Peerage Case*, [1903] A. C. 395, and *Yool* v. *Ewing*, [1904] 1 Ir. R. 434.

the different parties may be given in evidence against any one of them. As soon as it is proved that a conspiracy existed and that A. and B. were members of it, everything done by A. is evidence against B., if it was done to carry out their joint purpose. Thus, in Hardy's trial for high treason, letters written by one conspirator to another were held to be evidence against the prisoner after his complicity in the conspiracy had been established. So, if several defendants in trespass be proved to be co-trespassers by other competent evidence, the declaration of one as to the motives and circumstances of the trespass will be evidence against all who are proved to have combined together for the common object (*d*).

But on a charge of conspiracy, although statements made by any conspirator for the purpose of carrying the conspiracy into effect are admissible in evidence against the others, statements by one not made in pursuance of the conspiracy are not admissible against the others, nor are statements made after the conspiracy has been abandoned or its object attained. Thus, in the case of *R.* v. *Blake* (*e*), where the prisoner was tried for conspiring with one Tye to defraud the Customs, Tye was an agent to pass goods through the Customs, and pay the proper duties. Blake was an official of the Customs called a "landing waiter." Passing goods through the Customs was effected as follows:—Tye made a list of the goods he wished passed. This was copied into the official Customs House record, and the original given to Blake to check the goods by as they came ashore. Blake tallied the goods with the list, and if the list was accurate, his duty was to write "Correct" across it, and add his initials. The duty payable was then calculated according to the list thus checked, and paid. Tye made a false list, which Blake certified as correct. Blake was caught; Tye absconded. To prove the conspiracy, Tye's day-book was tendered in evidence,

(*d*) *Per* Lord ELLENBOROUGH, C.J., in *R.* v. *Hardwick*, 11 East, 585.

(*e*) 6 Q. B. 126.

showing that the list Blake certified as correct could not have tallied with the goods actually put ashore and received, also Tye's cheque book, the counterfoil of which showed the amount of which the Crown had been defrauded by the conspiracy. Both documents were admitted, but on an application for a new trial, on the ground of improper reception of evidence, it was held that the day-book was properly admitted, but that the counterfoil of the cheque book was inadmissible and should have been rejected. In this case PATTESON, J., said, "You must establish the fact of a conspiracy before you can make the act of one the act of all, but you are not bound to bring the parties into each other's presence; the concert may be shown by either direct or indirect evidence" (*f*).

In *Hardy's Case* (*g*) evidence was tendered by the prosecution of a letter written by one of the conspirators, Thelwall, not then on trial, to his wife, who was not a party to the conspiracy, in which he simply detailed the part he had taken in the crime. EYRE, C.J., refused to admit this letter in evidence. He however accepted evidence that Thelwall had carried certain papers and delivered them to a printer, as this was a part of the criminal transaction itself.

(iii.) *Depositions under* 30 & 31 *Vict. c.* 35, *s.* 6.

A deposition is a record written by an official person of a statement made on oath duly administered in the presence of a magistrate or other person who has authority in the circumstances to administer the oath. Such record must be made while the evidence is being given.

As a rule a deposition is not admissible as evidence in any legal proceeding unless it was made in the presence of the person against whom it is proposed to use it.

(*f*) 6 Q. B. at p. 137.
(*g*) 24 How. St. Tr. 451.

But to this rule there are exceptions. A deposition taken for the perpetuation of testimony in criminal cases under 30 & 31 Vict. c. 35, s. 6, is admissible as evidence, either for or against the accused, upon the trial of any offender or offence to which it relates—

(a) if the deponent is proved to be dead, or
(b) if it is proved that there is no reasonable probability that the deponent will ever be able to travel or to give evidence, but in both cases
(c) the deposition must have been signed by the magistrate by or before whom it is taken, and
(d) it must be proved to the satisfaction of the Court that reasonable notice in writing of the intention to take such deposition was served upon the person (whether prosecutor or accused) against whom it was proposed to be read, and
(e) that such person or his advocate had or might have had, if he had chosen to be present, full opportunity of cross-examining the deponent.

A similar provision is contained in s. 29 of the Children Act, 1908 (*h*).

(iv.) *Symptoms.*

Statements made by a person with respect to his bodily or mental feelings or condition, or state of health, are admissible in evidence when such feelings or condition, at the time of such statements, are material to some issue in the proceedings, although the person against whom the evidence is tendered was not present when the statement was

(*h*) 8 Edw. VII. c. 67; and see *post*, p. 287.

made. This is so both in civil and criminal cases, and whether the person whose symptoms are described in the statement is still alive or not.

A statement made by a patient in answer to the inquiries of his medical attendant is evidence of the state of health of the patient at that date, nor is it in every case essential that the statement should be made to a medical man. Thus, in *Aveson* v. *Lord Kinnaird* (*i*), the action was on a policy of insurance on the life of the plaintiff's wife. The deceased had, at the time of her examination by the medical officer of the defendants, represented herself as being in good health. The defendants offered evidence that a few days after the policy was made she had given to a neighbour a totally different account of her health. It was held that the witness might relate her conversation with the deceased, and that the statements of the latter, as so related, were evidence to show that the policy was obtained by misrepresentation. But letters to a medical man from a patient detailing the symptoms of his malady have been held not admissible (*k*), the Judge Ordinary saying: "I shall not set a precedent for the admission of written communications to a medical man."

Lord Ellenborough, C.J., in giving judgment in *Aveson* v. *Lord Kinnaird*, said (*l*) :—

"What were the complaints, what the symptoms, what the conduct of the parties themselves at the time, are always received in evidence upon such inquiries and must be resorted to from the very nature of the thing."

But, as Charles, J., said in *R.* v. *Gloster* (*m*),—

"the statements must be confined to contemporaneous symptoms, and nothing in the nature of a narrative is admissible as to who caused them, or how they were caused."

On the same principle, in Divorce proceedings, what

(*i*) 6 East, 188; Cockle, 69.
(*k*) *Witt* v. *Witt and Klindworth*, 3 Sw. & T. 143.
(*l*) 6 East, at p. 195.
(*m*) 16 Cox, 473.

the husband and wife had said to each other, or letters written by either party to the other, when there was no ground to suspect collusion, are admissible evidence to show the terms on which they lived (*n*).

(v.) *Dying Declarations.*

Statements made by a person, since deceased, relating to the circumstances which ultimately cause his death, are admissible in evidence against a person who is being tried for the murder or manslaughter of such deceased person, provided such statements were made when he was in settled, hopeless expectation of death. Such statements are known as "dying declarations." They usually are made orally; but they may be reduced into writing. They are not depositions; they are seldom, if ever, made on oath; neither the accused nor any magistrate need be there when they are made.

We have here another exception to the rule that evidence is inadmissible, unless given on oath, and unless the party who is to be affected by it can have the benefit of cross-examining the declarant. It exists only in criminal cases of murder and manslaughter, and is confined to statements, made in settled, hopeless expectation of death, as to the identity of the offender, or the circumstances of the offence. It is presumed that the sense of approaching death in the declarant is calculated to produce in him a sentiment of responsibility, equal to that which a religious and conscientious man feels when required to make a statement on oath (*o*). Where the sense or conviction

(*n*) *Trelawney* v. *Coleman*, 1 B. & Ald. 90; cf. *Willis* v. *Bernard*, 8 Bing. 376.

(*o*) *Nemo moriturus præsumitur mentiri.*

of approaching death is deficient or uncertain, dying declarations will not be received. Even when they are received, their value and credibility will vary according to the circumstances. But they are still open to the strong objection that they are usually given in evidence against one who has had no opportunity of cross-examining the declarant, and thus of refuting out of his own mouth the errors, omissions, contradictions, and possibly wilful misstatements, which the latter may have committed (*p*). It often happens, also, that the declaration is made under pressure, when the declarant is suffering from physical exhaustion or mental aberration, and when he is partially, or even wholly, unconscious of the full purport of his declaration. These considerations, combined with the strong objection of the English law to condemn any man on the testimony of an absent, or even a deceased, witness, induce Courts to regard this species of evidence with great watchfulness and suspicion. It is the duty of the judge to inquire into the circumstances under which the declaration has been made, as a condition precedent to its admission; and he will generally exclude it, if there appear to be any reasonable doubt as to the sanity, consciousness, or sense of impending dissolution in the mind of the declarant at the time the statement was made (*q*).

Thus, in *R.* v. *Woodcock* (*r*), Eyre, C.J., said:—

"The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of justice."

In this case it was held that a statement made by the

(*p*) *R.* v. *Perry*, [1909] 2 K. B. 697.

(*q*) See the remarks of Lord Denman, C.J., in *The Sussex Peerage Case*, 11 Cl. & F. 112.

(*r*) 1 Leach, C. C. 502; Cockle, 223; and see *R.* v. *Edmunds*, 25 T. L. R. 658.

deceased to a magistrate who administered an oath to her extrajudicially, and which, therefore, could not be received as a deposition, was yet admissible as a dying declaration, as it was made by her when her dissolution was fast approaching, and when she must have known the fact, although she said nothing that indicated such a knowledge. The judge there left it to the jury to say whether the statement was made under the apprehension of death; but the law now is that the judge himself must decide this question.

There appears to be no definite limitation of the time, before death, within which the declaration must be made. But it must be made when the declarant is in actual danger of death and when he is in a settled, hopeless expectation of death. As CHARLES, J., said in *R.* v. *Gloster* (*s*),—

"There must be an unqualified belief in the nearness of death; there must be a belief without hope in the declarant that he is about to die."

The phrase now regarded as the best guide is that used by WILLES, J., in *R.* v. *Peel* (*t*), "a settled hopeless expectation of death."

In *R.* v. *Abbott* (*u*), it was held that the constant reiteration of the words, "I'm dying," by a woman who had taken poison was insufficient "as the expression of the real idea of impending death." But the statement "I'm dying; look to my children," was held sufficient by HAWKINS, J. (after consulting BAGGALLAY, L.J.) in *R.* v. *Goddard* (*x*).

KELLY, C.B., summed up the matter as it stood in 1869 in *R.* v. *Jenkins* (*y*) in the following manner:—

"The result of the decisions is that there must be an unqualified belief in the nearness of death, a belief without hope that the declarant is about to die. If we look at reported cases, and at the

(*s*) 16 Cox, 471.
(*t*) 2 F. & F. 21; and see *R.* v. *Perry*, [1909] 2 K. B. 697.
(*u*) 67 J. P. 151.
(*x*) 15 Cox, 7.
(*y*) L. R. 1 C. C. R. at p. 92.

language of learned judges, we find that one has used the expression, 'every hope of this world gone' (*z*); another, 'settled, hopeless expectation of death' (*a*); another, 'Any hope of recovery, however slight, renders the evidence of such declarations inadmissible' (*b*). We as judges must be perfectly satisfied, beyond any reasonable doubt, that there was no hope of avoiding death; and it is not unimportant to observe that the burden of proving the facts that render the declaration admissible is upon the prosecution."

In that case a woman made a statement to the magistrate's clerk, who added to it the words, "I have made the above statement with the fear of death before me, and with no hope of my recovery," and then read it over to her and asked her if it was correct. She thereupon requested him to insert the words "at present," so that it read "with no hope at present of my recovery." It was held that her request to have these words inserted qualified the force of her statement sufficiently to make it inadmissible in evidence as a dying declaration, because it thus showed that there was not that absolute and hopeless expectation of death which is required to give such declarations validity (*c*).

In another case, the deceased made a declaration stating at the time that he believed he should not recover. His spine was then broken in such a way that death must have followed soon. Shortly before he had made the declaration, he had said to a witness: "The surgeon has given me some little hope that I am better; but I do not myself think that I shall ultimately recover." The declaration was held to be admissible, as the opinion of the surgeon on the subject is immaterial (*d*). But, if the conditions existing at the time of making a statement are such as render it admissible, it will not be rendered inadmissible by the fact that after making it the deceased entertained a hope of recovery (*e*).

The test always is, Did the person making the statement believe *at the time of making the statement* that death

(*z*) *Per* EYRE, C.B., in *R.* v. *Woodcock*, 1 Leach, 502.
(*a*) *Per* WILLES, J., in *R.* v. *Peel*, 2 F. & F. 22.
(*b*) *Per* TINDAL, C.J., in *R.* v. *Hayward*, 6 C. & P. 160.
(*c*) *R.* v. *Jenkins*, L. R. 1 C. C. R. 187.
(*d*) *R.* v. *Reany*, Dears. & B. 151.
(*e*) *R.* v. *Hubbard*, 14 Cox, 565.

was impending, and that there was no hope of recovery? Thus, "I am in great danger; I fear I must die," was held not sufficient to establish such belief (*f*). And so was "I do not think I shall be long with you" (*g*).

Again, in a case where a young woman who was very ill as the result of an illegal operation performed upon her, but not in fear of immediate death, made a statement to the police as to the cause of her condition, and a week later, when really in fear of death and without hope of recovery, heard the statement read over by a magistrate and acknowledged it as true, DARLING, J., after consulting the Recorder of London, refused to admit it (*h*).

Any statement made by the deceased shortly before or at the time of making an alleged dying declaration is admissible in evidence to show the state of mind of the declarant at the time the declaration was made (*i*). Declarations made under apprehension of death, if otherwise admissible, will not be rejected because a considerable time does in fact elapse between the declaration and the death. Thus, in *R.* v. *Mozley* (*k*), the declarations were held by all the judges to have been rightly received, although the deceased did not die until eleven days after making them, and although the surgeon held out slight hopes of recovery to him until a few hours before his death. Here, however, the deceased had frequently expressed a belief, prior to the statement, that he should never get better. So, in *R.* v. *Bernadotti* (*l*) a declaration was admitted although the declarant lived for three weeks after making it. There was no evidence in this case of any subsequent hope of recovery.

The statement must be a voluntary declaration and not elicited by suggestive questions. If a declaration is taken down in writing by anyone, it

(*f*) *R.* v. *Osman*, 15 Cox, 1.
(*g*) *R.* v. *Gloster*, 16 Cox, 471.
(*h*) *R.* v. *Whitmarsh*, 62 J. P. 680.
(*i*) *R.* v. *Cleary*, 2 F. & F. 853.
(*k*) 1 Moo. C. C. 97; cf. *R.* v. *Smith*, L. & C. 607.
(*l*) 11 Cox, 316.

"should be taken down in the exact words which the person who makes it uses, in order that it may be possible, from those words, to arrive precisely at what the person making the declaration meant. When a statement is not the *ipsissima verba* of the person making it, but is composed of a mixture of questions and answers, there are several objections open to its reception in evidence which it is desirable should not be open in cases in which the person accused has no opportunity of cross-examination" (*m*).

But in *R.* v. *Woodcock* (*n*) a statement taken down in the usual way by a clerk to magistrates for the purpose of being afterwards used as a deposition was received as a dying declaration. So in *R.* v. *Fagent* (*o*) answers made by a person *in articulo mortis* to questions put by a surgeon for the purpose of ascertaining whether he ought to call in a magistrate were received in evidence (*p*).

Evidence of this description is only admissible where the death of the deceased is the subject of the charge, and where the circumstances of the death are the subject of the dying declaration. It is then admissible for the defence as well as for the prosecution (*q*). So, where the prisoner was indicted for administering savin to a pregnant woman with a view to procure abortion, Bayley, J., rejected evidence of her dying declaration concerning the cause of her death, because the death was not the subject of the pending inquiry (*r*).

It only remains to add that not even a dying declaration can be received if made by one who would not be a credible or possible witness in open court or who could not properly appreciate his serious condition. Thus, a declaration by a dying child four years old as to the person who struck her the blow which was causing her death was rejected on the ground that she could not have realised the nature of an oath, or even the serious

(*m*) *Per* Cave, J., in *R.* v. *Mitchell*, 17 Cox, 503.
(*n*) 1 Leach, 504.
(*o*) 7 C. & P. 238.
(*p*) See also *R.* v. *Smith*, 65 J. P. 426.
(*q*) *R.* v. *Scaife*, 1 Moo. & R. 551.
(*r*) *R.* v. *Hutchinson*, 2 B. & C. 608, n.; *R.* v. *Mead*, 2 B. & C. 605; *R.* v. *Hind*, 29 L. J. M. C. 147, 253.

position in which she was (*s*). But the law has been so altered that very few witnesses now are incompetent hence this rule seldom applies.

(vi.) *The Complaint in Rape, etc.*

On a criminal charge of rape or indecent assault, statements made by the prosecutrix, though behind the back of the accused, if made at the earliest reasonable opportunity after the offence, are admissible in evidence as corroboration of the story which the prosecutrix has told in the witness-box, or as negativing her consent.

This rule is a striking exception to the general principle that statements made behind the back of a party are not admissible in evidence against him. It only applies to cases of rape, indecent assaults, and like offences under the Criminal Law Amendment Act, 1885. We proceed to consider the chain of cases beginning with *R.* v. *Lillyman* (*t*), and ending with *R.* v. *Norcott* (*u*). In the first-named case, the prisoner was tried on an indictment containing three counts: first, for an attempt to have carnal knowledge of a girl over the age of thirteen and under the age of sixteen years; second, for an assault with intent to rape; and third, for an indecent assault. To the first count it is no defence to prove that the girl consented, though it is to the other two charges. Evidence was tendered of a complaint made by the prosecutrix, and, in spite of objection by the prisoner, it was received. The jury convicted, but on the first count only. A case was reserved and the point argued before the Court for Crown Cases Reserved. The Court held that the evidence

(*s*) *R.* v. *Pike*, 3 C. & P. 598.
(*t*) [1896] 2 Q. B. 167.
(*u*) [1917] 1 K. B. 347.

was rightly received, and upheld the conviction. HAWKINS, J., laid down the law as follows (*x*) :—

"It is necessary, in the first place, to have a clear understanding as to the principles upon which evidence of such a complaint not on oath, not made in the presence of the prisoner, nor forming part of the *res gestæ*, can be admitted. It clearly is not admissible as evidence of the facts complained of; those facts must therefore be established, if at all, upon oath by the prosecutrix or other credible witness, and, strictly speaking, evidence of them ought to be given before evidence of the complaint is admitted. The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as being inconsistent with her consent to that of which she complains."

Soon after *R.* v. *Lillyman* an attempt was made to extend the rule to all cases, and in *R.* v. *Folley* (*y*) the Recorder of London admitted evidence of a complaint on a charge of wounding with intent to do grievous bodily harm, but almost immediately that ruling was dissented from in a civil action (*z*) for damages, where the female plaintiff alleged that the defendant, a surgeon, had operated upon her without her consent. A complaint was tendered in evidence; but HAWKINS, J., rejected it, saying with reference to *R.* v. *Lillyman* :—

"The principle of that decision is only applicable to cases of rape and similar offences against women and girls. It is not of general application."

The decision in *Beatty* v. *Cullingworth* has since been accepted as stating the correct rule. It is essential to bear in mind that to the charge on which Lillyman was actually convicted the consent of the prosecutrix was immaterial. But, strangely enough, this fact was overlooked, and it was thought that a complaint was admissible only in cases where consent is a defence and for the purpose only of negativing such consent (*a*). But in one case it was admitted where the girl alleged to

(*x*) [1896] 2 Q. B. at p. 170.
(*y*) 60 J. P. 569.
(*z*) *Beatty* v. *Cullingworth*, 60 J. P. 740.
(*a*) *Per* HAWKINS, J., in *R.* v. *Rowlands*, 62 J. P. 459; and *R.* v. *Kingham*, 66 J. P. 393.

have been assaulted was so young that her evidence was taken without her being sworn, and her consent was immaterial (*b*).

In *R.* v. *Osborne* (*c*) the principle of *Lillyman's Case* was again considered by the Court for Crown Cases Reserved, and all the authorities were discussed. In *Osborne's Case* the prisoner was tried on an indictment containing two counts, one of which charged him with an indecent assault and the other a common assault. The girl assaulted was twelve years old, and her consent could have afforded no defence. The prisoner kept a shop in Kidderminster, about five minutes' walk from the child's residence, and on the day in question she and two other little girls came to his shop. He sent the other two out on an errand, detained the prosecutrix, and indecently assaulted her. She made no resistance or objection, but on opportunity offering she ran away. While on her way she met the other two returning, and, on one of them asking her why she had not waited until they came, she made a complaint. At the trial this complaint was tendered in evidence, and was objected to on two grounds: (1) that *R.* v. *Lillyman* only applied to cases in which consent was a defence; and (2) that the complaint was made in answer to a question (*d*). The evidence was admitted, and the prisoner was convicted, but a case was reserved on both points. The Court overruled both objections and confirmed the conviction, RIDLEY, J. (who delivered the judgment of the whole Court), saying (*e*):—

"It appears to us that the mere fact that the statement is made in answer to a question in such cases is not of itself sufficient to make it inadmissible as a complaint. Questions of a suggestive or leading character will, indeed, have that effect, and will render it inadmissible; but a question such as this, put by the mother or other person, 'What is the matter?' or 'Why are you crying?' will not do so. These are natural questions which a person in

(*b*) *Per* RIDLEY, J., in *R.* v. *Kiddle*, 19 Cox, 77.
(*c*) [1905] 1 K. B. 551.
(*d*) See *R.* v. *Merry*, 19 Cox, 442; *R.* v. *Brasier*, 1 Leach, 199.
(*e*) [1905] 1 K. B. at p. 556.

charge will be likely to be put. On the other hand, if she were asked, 'Did So-and-so' (naming the prisoner) 'assault you?' 'Did he do this and that to you?' then the result would be different, and the statement ought to be rejected. In each case the decision on the character of the question put as well as other circumstances, such as the relationship of the questioner to the complainant, must be left to the discretion of the presiding judge. If the circumstances indicate that but for the questioning there probably would have been no voluntary complaint, the answer is inadmissible (*f*). If the question merely anticipates a statement which the complainant was about to make, it is not rendered inadmissible by the fact that the questioner happens to speak first. In this particular case, we think that the chairman of quarter sessions acted rightly, and that the putting of this particular question did not render the statement inadmissible."

And again (*g*)—

"It appears to us that, in accordance with principle, such complaints are admissible, *not merely as negativing consent, but because they are consistent with the story of the prosecutrix.* In all ordinary cases, indeed, the principle must be observed which rejects statements made by anyone in the prisoner's absence. Charges of this kind form an exceptional class, and in them such statements ought, under proper safeguards, to be admitted. Their consistency with the story told is, from the very nature of such cases, of special importance."

But the Court's finding (*h*)—

"applies only where there is a complaint not elicited by questions of a leading and inducing or intimidating character, and only when it is made at the first opportunity after the offence which reasonably offers itself. Within such bounds we think the evidence should be put before the jury, the judge being careful to inform the jury that the statement is not evidence of the facts complained of, and must not be regarded by them, if believed, as other than corroborative of the complainant's credibility and, when consent is in issue, of the absence of consent."

In *R.* v. *Norcott* (*i*) the prisoner was charged with indecently assaulting his illegitimate daughter, a girl seventeen years of age. After a struggle she got away from him and went into the next room where her sister was sleeping. The sister asked her what was the matter, to which she replied, "Hush, and I will tell you in the

(*f*) See however *R.* v. *Norcott*, [1917] 1 K. B. 347.
(*g*) [1905] 1 K. B. at p. 558.
(*h*) *Ibid.* at p. 561.
(*i*) *Supra.*

morning." On the next morning, however, she said nothing to her sister; but on her way to work she called upon a Miss Davies, a woman old enough to be her mother, and with whom she was very intimate. Miss Davies noticed that she had been crying and asked her what was the matter. She refused to say, whereupon Miss Davies caught hold of her bicycle and said, "I won't let you go until you do tell me." The girl then made a complaint against her father. Miss Davies was called as a witness at the trial, and stated that when she detained the girl she had no suspicion that the trouble was of so serious a nature or that it had anything to do with her father. Counsel for the prisoner objected to the details of the girl's complaint being laid before the jury, but the evidence was admitted, and it was held in the Court of Criminal Appeal that it was rightly admitted. Viscount READING, C.J., said (*k*):—

> "The Court in *R.* v. *Osborne* meant to guard against admission in evidence of statements which have been put into the mouth of the prosecutrix by questions of a leading or suggestive character. The Court is concerned to see that in the present case the statement made by the girl was spontaneous in the sense that it was her unassisted and unvarnished statement of what happened. . . . The evidence is not inadmissible because questions were put to the girl which might have had the effect of persuading her to tell her unassisted and unvarnished story."

It is now clear law, therefore, that in cases of rape and indecent assault the terms of any complaint made by the prosecutrix shortly after the commission of the offence may be given in evidence if the defence set up is (a) that the prosecutrix consented, or (b) that her whole story is a concoction and a lie. It is the duty of the judge to impress upon the jury in every case that they are not entitled to make use of the complaint as any evidence whatever of the facts or for any

(*k*) [1917] 1 K. B. at p. 350.

other purpose than those above stated. Unless the jury are thus warned, the conviction will be quashed (*l*). The complaint must relate only to the occasion of the alleged offence. Anything else is inadmissible (*m*).

It is still doubtful, however, whether the whole of the complaint is admissible if the defence is mistaken identity, and in such complaint she has named her assailant. In each of the three cases cited above no objection was taken to the admissibility of the complaint on the ground that it disclosed the name of the alleged assailant. This point arose in another and earlier case called *R.* v. *Osborne* (*n*) where at the trial of an indictment for rape, the prosecutrix on oath stated that soon after the alleged outrage, and as she was returning home, she made a complaint to a Mrs. Partridge, who was called as a witness to confirm her statement. Counsel for the prosecution was allowed to ask, "Did the prosecutrix make any complaint?" To which the answer was "Yes." He was then allowed to ask, "Did she name any particular person?" To which the answer also was "Yes." It was then proposed by the counsel to ask, "Whose name was mentioned?" To this it was objected that the question was inadmissible, upon the ground that, though the fact of the complaint was admissible as showing the prosecutrix was not then an assenting party, the name was an important particular as against the prisoner, and therefore could not be asked. In support of the question it was urged that the whole complaint was admissible as part of the *res gestæ*. CRESSWELL, J., ruled that the statement of the prosecutrix did not form part of the *res gestæ*. He treated *R.* v. *Wink* (*o*) as a direct authority against the question. The Court in *R.* v. *Lillyman* said (*p*) :—

(*l*) See *per* HAWKINS, J., in *R.* v. *Lillyman*, [1896] 2 Q. B. at p. 178.
(*m*) *R.* v. *Pulteney*, 71 J. P. 101.
(*n*) (1842), Car. & M. 622.
(*o*) 6 C. & P. 397.
(*p*) [1896] 2 Q. B. at p. 175.

"In this ruling we agree; but if it had been pressed upon that learned judge that the complaint in all its detail was nevertheless a fact admissible for the purpose of showing consistency of conduct on the part of the woman, we doubt it he would have rejected the evidence."

CHAPTER IV.

WHAT THIRD PERSONS DID OR SAID TO OR IN THE PRESENCE OF A PARTY.

THE acts and statements of third persons, done or made in the presence of a party to the proceedings, are admissible in evidence against that party so far as they throw light upon the subsequent conduct of that party, but they are not admissible for any other purpose; they are, in fact, of no legal value in themselves; they are only admitted because they tend to explain what the party did or said thereupon.

The matter which has to be proved is, What did the party say or do at a certain moment, when something was said to him by a third person? But it is obviously material to know what the third person said; else we cannot understand the true meaning and effect of the party's reply, or, if he made no reply, of his silence. Thus, if a prosecutor saw a watch in the prisoner's room, and said, "Hallo, that's my watch. How did you get hold of it?" this statement is not of any value in itself, but it is admissible in order to explain the true meaning of what the prisoner said or did in reply. He may assert that the watch is his; he may explain how he came by it; he may hang down his head and say nothing. But in any case his language and demeanour will throw light upon the question, Did he come by the watch honestly or dishonestly?

As HAWKINS, J., said in *R.* v. *Smith* (*a*),

"Before a bare statement made by another person in an accused person's presence and prejudicial to him is allowed to be used as evidence against him, there must be something in the shape of action, conduct or words, which, in the opinion of the judge, would justify the jury in drawing an inference that the accused substantially admitted the story told against him."

This, it is submitted, is the true ground on which in *Lister* v. *Perryman* (*b*) hearsay evidence was held rightly admitted as "reasonable and probable cause" for the prosecution of Perryman. Lister's coachman, Hinton, told his master what Perryman had said and done when accused by him and Robinson of stealing Lister's gun and keeping it concealed in his father's stable, where Robinson had told Hinton he had seen it. Lister thereupon ordered Perryman to be arrested, and he was tried and acquitted. He then brought an action for malicious prosecution against Lister, who pleaded that he had reasonable and probable cause for the prosecution. The judge in the court below directed the jury that hearsay evidence could not be reasonable and probable cause, but the House of Lords held this to be a misdirection. Lister, in fact, acted upon what Hinton told him Perryman had said and done when he was accused by Hinton and Robinson of having stolen the gun.

Again, silence in some cases is almost tantamount to an admission. If a person does or says nothing when he is charged with a crime, the fact that he remains silent is admissible as approaching an admission of guilt, and the words of the charge are also admissible (*c*), the important point being, not the accusation, but the silence or other conduct of the person accused (*d*).

Two recent cases further illustrate this matter. In one case a woman was charged with murder of her child. She made a statement as to its death to her husband, who repeated it to the police in her presence;

(*a*) 18 Cox, 472; but see *R.* v. *Thompson*, [1910] 1 K. B. 640.
(*b*) L. R. 4 H. L. 521.
(*c*) *Bessela* v. *Stern*, 2 C. P. D. 265.
(*d*) *R.* v. *Feigenbaum*, [1919] 1 K. B. 431.

she made no reply, but burst into tears. It was held that the husband's statement was admissible, for it led up to and explained her subsequent conduct (*e*). In the other case the prisoner and a friend of his were charged with larceny and receiving. In reply to the charge the friend said, in the presence of the prisoner, that it was "quite right," and that he had sold the goods to the prisoner. The police then read over a previous statement made by the friend. In neither case did the prisoner make any reply. It was held that evidence of such facts was admissible (*f*).

In the case of a criminal charge, where it is alleged that the person accused has confessed his guilt, evidence of what other persons did or said to induce him to make that confession is most material, and may indeed render the confession itself inadmissible (*g*). Silence may be construed into an admission, if the occasion be such that a contradiction or explanation may reasonably be expected from the party. But a prisoner in the dock may not interrupt the proceedings, and can only make statements at the proper opportunities granted him by the law; his silence therefore at other times will not tell against him.

In *Wiedemann* v. *Walpole* (*h*), where the plaintiff had repeatedly written letters to the defendant in which she stated that he had promised to marry her, the mere fact that he had never answered any of them was held to be no corroboration of the plaintiff's story. Bowen, L.J., said (*i*):—

(*e*) *R.* v. *Bexley*, 70 J. P. 263.
(*f*) *R.* v. *Bromhead*, 71 J. P. 103.
(*g*) See *post*, p. 95.
(*h*) [1891] 2 Q. B. 534.
(*i*) [1891] 2 Q. B. at pp. 539, 540; and see *Dawson* v. *Dawson*, 22 T. L. R. 52.

"Silence is not evidence of an admission, unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not. Silence is not evidence of an admission, unless it is reasonable to expect that if the statements made were untrue they would be met with an immediate denial."

So far we have dealt with instances in which the person prejudicially affected by a statement made in his presence either admits that statement or remains silent. There is of course a third case in which he denies the truth of the statement so made. Such a denial may be proved by his counsel if he thinks it will tell in favour of his client—and this both in criminal and civil proceedings. In civil proceedings counsel on either side can still prove that such a denial was made. Till recently the practice was the same in criminal cases. The counsel for the accused could of course prove the denial. And indeed it was regarded as the duty of the counsel for the prosecution to prove that when any charge was made against the prisoner he at once stoutly denied it; for the prosecution should bring out facts which tell in favour of the prisoner as well as facts which tell against him. But this practice has been lately called in question in two cases, in both of which the accused had at once denied the truth of the charge made against him.

In the case of *R.* v. *Norton* (*k*), it was decided that the contents of a statement alleged to have been made in the presence of a prisoner cannot be given in evidence, unless and until the judge has satisfied himself, from the evidence contained in the depositions or given at the trial, that there is

(*k*) [1910] 2 K. B. 496.

evidence, fit to be submitted to the jury, that the prisoner by his answer to the statement, whether given in words or by conduct, acknowledged the truth of the whole or some material part of the statement; and that if the contents of the statement are admissible in evidence, in accordance with the above rule, the jury should be directed that they are entitled to take the statement into consideration as evidence in the case, not because the statement is evidence of the matters contained in it, but solely because of the prisoner's acknowledgment of its truth.

This decision was subsequently considered in the House of Lords in the case of *R.* v. *Christie* (*l*), where the facts were very similar; and it was laid down that there is no rule of law that evidence of a statement made in the presence and hearing of the accused is not admissible as having a bearing on his conduct unless he accepts the statement; but where the accused denies the truth of the statement the presiding judge, in the absence of special circumstances, should intimate to counsel for the prosecution that, inasmuch as the evidence, though admissible, would have little value and might unfairly prejudice the jury against the accused, it ought not to be admitted. The Court of Criminal Appeal had followed the decision in *R.* v. *Norton*, and the House of Lords held that they were wrong in so doing. Such evidence, then, is strictly admissible in law in reference to the demeanour of the accused, though, when the statement is denied, a judge may in a proper case

(*l*) [1914] A. C. 545.

oppose its reception in such a manner as practically to exclude it.

A statement made by a third person on oath in a former legal proceeding is only admitted in a subsequent proceeding which is between the same parties or their privies as the former one and raises substantially the same issue, and the party against whom it is tendered or his predecessor in title had the opportunity of cross-examining the witness at the former trial.

Further, such evidence is only admissible if the witness is unable to attend the trial of the subsequent proceeding—

(i.) because he is dead, or
(ii.) is permanently insane, or
(iii.) is kept out of the way by the adverse party, or in some cases, if
(iv.) he is so ill that it is probable he will never be able to travel (*m*), or
(v.) is out of the jurisdiction, or
(vi.) cannot be found after proper search and inquiry.

Suppose the Court of Appeal has set aside the verdict and judgment given at the first trial of an action and ordered a new trial. In the interval since the first trial a material witness for the plaintiff has died. A shorthand note of the evidence given by this witness at the former trial can be put in and read on the second hearing. And it would make no difference if in the interval one of the parties had died, and his heir or executor had been substituted for him as a party on the record. There is more difficulty in applying this rule to cases in which

(*m*) If the illness is temporary the proper course would seem to be to postpone the trial (*Harrison* v. *Blades*, 3 Camp. 458).

the evidence was given in a different action. In the first place, the parties to the two actions must be substantially the same, and the issues practically identical, although the relief claimed may be different (*n*). The statements made by the witness cannot be given in evidence against any person who was not a "party or privy" (*o*) to the former action (*p*); the person against whom this evidence is tendered, or someone under whom he claims, must have had an opportunity to cross-examine the witness (*q*). The statements must be such that they are admissible against the party tendering them as well as against the opposite party (*r*).

The rule applies in criminal cases, except that the former evidence of a witness who is out of the jurisdiction, or cannot be found, is, it seems, inadmissible (*s*). If a witness has been kept away by the contrivance of one of two prisoners, his former evidence is admissible against that prisoner, but not against the other. It is doubtful how far this is the law in civil cases. Both in civil and criminal cases the rule is that the evidence is admissible if a witness be kept away by collusion, or other improper means. But it cannot be said that every species of mere subsequent incapacity to appear will let in evidence that has been given at a former trial (*t*).

The former evidence of a witness when admissible may be proved "from notes that have been taken by any person who will swear to their accuracy; or by any person who will swear from his memory to its having been given" (*u*).

(*n*) *Brown* v. *White*, 24 W. R. 456.

(*o*) See *Morgan* v. *Nicholl*, L. R. 2 C. P. 117.

(*p*) *Lady Llanover* v. *Homfray*, 19 Ch. D. 224; and see *Printing, etc., Co.* v. *Drucker*, [1894] 2 Q. B. 801; *Shepheard* v. *Bray*, [1906] 2 Ch. 235.

(*q*) *Attorney-General* v. *Davison*, M'Clel. & Y. at p. 169; cf. *Nevil* v. *Johnson*, 2 Vern. 447.

(*r*) See *Morgan* v. *Nicholl*, *supra*.

(*s*) *R.* v. *Scaife*, 17 Q. B. 242; Cockle, 376; *Green* v. *Gatewick*, Bull. N. P. 242 b.

(*t*) *R.* v. *Eriswell*, 3 T. R. 707; Cockle, 152.

(*u*) *Per* Sir JAMES MANSFIELD, C.J., in *Mayor of Doncaster* v. *Day*, 3 Taunt. 262; Cockle, 230.

It seems however that the judge's notes taken in a former trial are not admissible in evidence in another suit if objected to. It is open to the parties to enter into an agreement that the judge's or a shorthand writer's notes at the first trial shall be received as evidence in the second; and after such consent neither party can dispute their validity (*x*). The Court will, however, require distinct evidence of such an agreement (*y*). In the absence of such consent, it would appear the judge's notes cannot be received to prove the former evidence of a witness.

It appears that a judge of the High Court cannot be called to give evidence of the substance of a former trial, but that he may be called to prove anything collateral or incidental to it (*z*). In *R.* v. *Gazard*, PATTESON, J., recommended the grand jury not to examine one of their number, who had been Chairman of Quarter Sessions on the trial when the prisoner had committed the alleged perjury. However, in a trial for perjury, under a committal by a County Court judge, BYLES, J., held that the judge ought to have been called to prove the perjury from his notes, and that the rule prohibiting the calling of judges as witnesses is confined to judges of the superior Courts (*a*). An arbitrator is an admissible witness to prove what took place before him up to the making of his award, so as to show what was the subject-matter into which he was inquiring, but he must not be asked how his award was arrived at, nor can he be asked questions to explain or contradict his award (*b*).

It is sufficient that evidence of what occurred at a former trial, when admissible, should be substantially, without being literally, correct, except where actual words are the gist of the issue. Thus, on an indictment

(*x*) *Wright* v. *Tatham*, 1 A. & E. 3.
(*y*) *Doe* v. *Earl of Derby*, 1 A. & E. 783.
(*z*) *R.* v. *Gazard*, 8 C. & P. 595; *R.* v. *Earl of Thanet*, 27 How. St. Tr. 845.
(*a*) *R.* v. *Harvey*, 8 Cox, 99.
(*b*) *Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. 418.

for perjury, evidence of the words spoken, coupled with a confident conviction on the part of the witness that they were all that was material to the pending inquiry, and that they were not qualified by other expressions, has been held to be sufficient (*c*).

Rule 3 of Order XXXVII. of the Rules of the Supreme Court, 1883, provides that—

"An order to read evidence taken in another cause or matter shall not be necessary, but such evidence may, saving all just exceptions, be read on *ex parte* applications by leave of the Court or a judge, to be obtained at the time of making any such application, and in any other case upon the party desiring to use such evidence giving two days' previous notice to the other parties of his intention to read such evidence."

This rule is only intended to dispense with the necessity of obtaining an order, and does not make evidence in another cause admissible unless the issue be the same and the parties the same (*d*).

Section 141 of the Bankruptcy Act, 1914 (*e*), provides that—

"In the case of the death of the debtor or his wife, or of a witness whose evidence has been received by any Court in any proceeding under this Act, the deposition of the person so deceased, purporting to be sealed with the seal of the Court, or a copy thereof purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to."

But the answers of a bankrupt on his public examination are not evidence against persons other than himself (*f*). Nor are they evidence against him in an action to which he is a party in a representative capacity (*g*).

As to reading at a trial depositions taken at a previous stage of the proceedings, see *post*, Book IV., Chap. III.

(*c*) *R.* v. *Rowley*, 1 Moo. 111.
(*d*) *Printing Telegraph, etc. Co.* v. *Drucker*, [1894] 2 Q. B. 801.
(*e*) 4 & 5 Geo. V. c. 59.
(*f*) *In re Brünner, Ex parte The Board of Trade*, 19 Q. B. D. 572.
(*g*) *New's Trustee* v. *Hunting*, [1897] 2 Q. B. 19, affirmed in *Sharp* v. *Jackson*, [1899] A. C. 419.

CHAPTER V.

WHAT THE PARTIES DID OR SAID IN THE TRANSACTION (INCLUDING CONFESSIONS).

ANYTHING that either party did in the transaction in issue is admissible in evidence both for and against him; and so is anything that he did in preparation for or furtherance of that transaction, and also anything that he did in reference to it even after it had taken place.

Anything that either party said in the transaction in issue and forming part of it is also admissible in evidence both against him and in his favour; but, as a rule, anything said *in reference to* the transaction, whether before or after it took place, is only evidence against the speaker, and not in his favour.

The word "said" is here used to include the words "wrote" and "written."

The events which constitute the transaction (or *factum probandum*) are always admissible; so, as a rule, are any facts which so closely accompany the transaction that a knowledge of them is indispensable if the transaction is to be viewed aright. Acts accompanying a transaction are more readily admitted than are spoken or written words.

First, then, evidence is always admitted to prove or disprove the events forming part of the transaction in

issue itself. Thus, in an action for slander, not only can the plaintiff prove what the defendant said, but the defendant can prove that on the same occasion he also said something else which so qualified or explained the words complained of as to make them incapable of bearing the defamatory meaning alleged (*a*). So, too, if a person be prosecuted for making counterfeit coins, the prosecution can prove that they found in the prisoner's room all the materials and things necessary for making such coins, and also coins in various stages of manufacture.

In an action by one shipowner against another for damages in respect of a collision between their vessels, the mere impact is only one of the facts going to make up the *factum probandum*, and, standing by itself, proves nothing. The issue is whether either ship was, or whether both of them were, negligently navigated, and, to prove that, all the factors existing at the time which a prudent navigator should take into account can be given in evidence. Thus, either party may adduce evidence to prove where the collision occurred; when it occurred; the depth of water; the state of wind, tide, and weather; the size and means of propulsion of each ship; their respective speeds and courses before, at, and immediately after the collision; the orders given at those times; and the like (*b*). The same principle applies in cases where the transaction is continuous, as in a conspiracy, or is made up of a number of similar acts, as is the case with the offences of common barratry and of keeping a disorderly house.

Secondly, not only must the tribunal have before it all the facts which make up the transaction in issue; it must also take the whole of these facts into its consideration, giving to each of them its proper weight, neither exaggerating nor diminishing its relative importance.

Witnesses, therefore, are required to give their evidence,

(*a*) *Brittridge's Case*, 4 Rep. 19.

(*b*) See *The St. Paul*, [1908] P. 320; cf. *The Schwalbe*, Swab. 521, and R. S. C., Order XIX., r. 28.

not merely in bare outline, but with reasonable detail. The "surrounding circumstances"—*i.e.*, the facts and events accompanying the transaction—must, as a rule, be proved. The extent to which such surrounding circumstances can be given in evidence will depend on the nature of each particular case.

As a rule, all facts and events leading up to, accompanying, and following the transaction in issue, which relate to it so closely that they must be known in order to arrive at a true view of the case, are admissible in evidence for either party; but all other written or spoken words are only admissible against the party who wrote or spoke them, not in his favour. Of course, if only part of the conversation on a particular occasion be given, he is entitled to have anything that he said laid before the Court if it qualifies or explains the statements already proved against him.

There are two cases in which the rule as to written or spoken words accompanying a transaction does not apply :—

(i.) When the issue is, With what intention did a party do an act which he is proved to have done? Anything he wrote or said in reference to that act, which throws light upon his intention, is, as a rule, admissible in evidence in his favour as well as against him.

Thus, a person charged with passing counterfeit coin may himself call evidence to show that, when passing the money, he pointed out that the coin did not seem to "ring" properly. It will, however, be more convenient to discuss this matter in the next chapter, where we shall deal with the admissibility of other transactions in order to show the intention of the party.

(ii.) Statements made in reference to the transaction in issue by a party to a civil action are called

"admissions." These are dealt with in a separate chapter (*c*). In criminal cases an admission by the accused person of his guilt is called a "confession." Such a confession is *primâ facie* receivable in evidence against him, but not in all cases.

A confession is not admissible in evidence, if it was obtained by any inducement held out to the accused by a person in authority in the proceedings which amounts to a promise or threat of some temporal advantage or disadvantage having direct reference to the charge, and to its result or consequences to him. The reason for this rule is that such an inducement might possibly cause the accused to make an untrue confession.

The term "person in authority" in this connection includes persons directly connected with the prosecution or proceedings against the person charged, such as the prosecutor, the magistrate, and police officers having custody of the prisoner. The inducement need not be expressed, but may be implied (*d*); it need not be made to the accused directly if it is intended to come, and does come, to his knowledge (*e*).

On these grounds a confession will be inadmissible when it has been obtained by any threat or promise of favour held out by a prosecutor; by the prisoner's master or mistress when the crime has been committed against either of them, but not otherwise (*f*); by the solicitor of such person in authority; by a constable, or anyone acting under a constable (*g*); and especially by a

(*c*) See *post*, p. 362.
(*d*) *R.* v. *Gilles*, 11 Cox, 69.
(*e*) See *R.* v. *Thompson*, [1893] 2 Q. B. at p. 17.
(*f*) *R.* v. *Moore*, 2 Den. 522.
(*g*) *R.* v. *Enoch*, 5 C. & P. 539.

magistrate (*h*). A medical man, called in to attend the prisoner, is not a person in authority (*i*).

The master of a servant is a person in authority in a proceeding against the servant only if the offence be one against the master. Thus, where a maidservant was indicted for child murder, a confession elicited from her by her mistress was held admissible, because the crime was in no way connected with the management of the house, and there was, therefore, no probability that the mistress or her husband would prosecute in it (*k*). So a confession elicited by an inducement held out by a non-resident daughter of a prosecutor is admissible; as she is not a person in authority (*l*). If, however, the inducement is made in the presence of a person in authority, such as a prosecutor, or one who is likely to be a prosecutor, who stands by and does not object, his silence is treated as a tacit acquiescence in the inducement, and the confession will be rejected (*m*). On the other hand, the mere presence of a constable is not enough to render the confession inadmissible if he does not interfere in giving the advice or holding out the inducement (*n*). And where one of two prisoners said to the other in the presence of the prosecutor and a policeman, "You had better tell him the truth," and neither the prosecutor nor the policeman spoke, a confession made by the prisoner so addressed was held admissible (*o*); and so was a confession in the case where the mother of one of the prisoners (who were young boys) said to them, in the presence of a constable and of the mother of the other boy, "You had better, as good boys, tell the truth" (*p*). When the inducement

(*h*) *R.* v. *Drew*, 8 C. & P. 140.
(*i*) *R.* v. *Gibbons*, 1 C. & P. 97; Cockle, 188.
(*k*) *R.* v. *Moore*, *supra*.
(*l*) *R.* v. *Sleeman*, Dears. 269.
(*m*) *R.* v. *Luckhurst*, Dears. 245.
(*n*) *R.* v. *Jarvis*, L. R. 1 C. C. R. 96; *R.* v. *Reeve*, L. R. 1 C. C. R. 362.
(*o*) *R.* v. *Parker*, L. & C. 42; and see *R.* v. *Baldry*, 2 Den. 430.
(*p*) *R.* v. *Reeve*, *supra*.

is held out by a person who has no authority in the matter, a confession will be admissible. Thus, when a prisoner's neighbours, who were not connected with the prisoner, advised her to tell the truth for the sake of her family, the confession was received (*q*). When the inducement has been once held out by a person in authority, no subsequent confession to such person will be admissible, unless it appear clear that the impression which it was calculated to make has been removed from the mind of the prisoner (*r*).

A confession made to a person in authority, if not induced by him, may be admissible (*s*); but a confession made to a third party, if induced by a person in authority, is inadmissible (*t*).

The prosecutor must prove affirmatively to the satisfaction of the judge that the confession was not obtained by improper means (*u*). In the absence of such satisfactory proof, the confession will not, of course, be received; and if a judge subsequently discovers that a confession has been improperly received, he will strike it from his notes, and direct the jury that it is to have no weight with them (*x*).

The following are instances of inducement where a subsequent confession has been rejected:—

"If you do not tell me who your partner was, I will commit you to prison" (*y*).

"Tell me where the things are, and I will be favourable to you" (*z*).

"If you are guilty, do confess; it will perhaps save your neck; you will have to go to prison; pray tell me if you did it" (*a*).

"If you do not tell me all about it, I will send for a constable" (*b*).

(*q*) *R.* v. *Rowe*, Russ. & R. 153; *R.* v. *Taylor*, 8 C. & P. 733.
(*r*) *R.* v. *Clewes*, 4 C. & P. 221; *R.* v. *Doherty*, 13 Cox, 23.
(*s*) *R.* v. *Gibbons*, 1 C. & P. 97; Cockle, 188.
(*t*) *R.* v. *Boswell*, Car. & M. 584.
(*u*) *R.* v. *Warringham*, 2 Den. 447, n.; *R.* v. *Thompson*, [1893] 2 Q. B. at p. 16.
(*x*) *R.* v. *Garner*, 2 Car. & K. 920.
(*y*) *R.* v. *Parratt*, 4 C. & P. 570.
(*z*) *R.* v. *Cass*, 1 Leach, 293, n.
(*a*) *R.* v. *Upchurch*, 1 Moo. C. C. 465.
(*b*) *R.* v. *Richards*, 5 C. & P. 318.

"You had better tell all you know" (*c*).
"Anything you can say in your defence we shall be ready to hear" (*d*).
"It would have been better if you had told at first" (*e*).
"I should be obliged to you if you would tell us what you know about it; if you will not, of course we can do nothing for you" (*f*).
"It will be best for you if you tell how it was transacted" (*g*).
"Speak the truth; it will be better for you if you do" (*h*).

On the other hand, confessions have been received, notwithstanding the following apparent inducements:—

"Be sure to tell the truth" (*i*).
"If you will tell where the property is, you shall see your wife" (*k*) [for this was no benefit to him in the matter of the proceeding].
"I should advise you that to any question that may be put to you you will answer truthfully, so that, if you have committed a fault, you may not add to it by stating what is untrue" (*l*).

In *R.* v. *Baldry* (*m*), the policeman who apprehended the prisoner told him, at the time of the apprehension, that "he need not say anything to criminate himself; what he did say would be taken down and used in evidence against him." The prisoner then confessed, and the Court for Crown Cases Reserved held that these words did not contain any promise or threat to induce the prisoner to confess, and the confession was admissible.

It is necessary, in order to exclude a confession, that the inducement held out should contain some promise or prospect of a temporal benefit. If, therefore, it amounts to no more than a moral or religious exhortation, the confession will be admitted. Thus, where a person said, to a boy of fourteen, who had been apprehended on a charge of murder, "Now, kneel you down by the side of

(*c*) *R.* v. *Thomas*, 6 C. & P. 353.
(*d*) *R.* v. *Morton*, 2 M. & R. 514.
(*e*) *R.* v. *Walkley*, 6 C. & P. 175.
(*f*) *R.* v. *Partridge*, 7 C. & P. 551.
(*g*) *R.* v. *Warringham*, 2 Den. 447.
(*h*) *R.* v. *Rose*, 78 L. T. 119; *R.* v. *Fennell*, 7 Q. B. D. 147.
(*i*) *R.* v. *Court*, 7 C. & P. 486; but see *R.* v. *Rose*, *supra*.
(*k*) *R.* v. *Lloyd*, 6 C. & P. 393; Cockle, 187.
(*l*) *R.* v. *Jarvis*, L. R. 1 C. C. R. 96.
(*m*) 2 Den. 430; Cockle, 182.

me and tell me the truth," and on the boy doing so added, "I am now going to ask you a very serious question, and I hope you will tell me the truth in the presence of the Almighty," the confession which followed was admitted by the judges (*n*). So the words, "Do not run your soul into more sin, but tell the truth," have been held not to contain an inducement of a temporal kind (*o*).

The temporal benefit or advantage, moreover, must be connected with or have reference to the result or consequences of the prosecution itself, leading the prisoner to the belief that his position in reference to the charge itself will be rendered better or worse by the confession or silence, *e.g.*, the suggestion of a pardon (*p*). The offer of a merely collateral temporal benefit or advantage during his imprisonment or trial is not such an inducement as will render the confession inadmissible; *e.g.*, an offer to give the prisoner some spirits (*q*), or to strike off his handcuffs (*r*), or a promise to let him see his wife (*s*).

A confession will not be inadmissible merely because it has been obtained by deception. Even when the prisoner has made it only on receiving a preliminary oath of secrecy from the person trusted, such person will be competent and compellable to reveal it (*t*); and a confession made by a prisoner while drunk has been received (*u*).

Voluntary statements made by a prisoner before a committing magistrate are strictly admissible against him. As soon as a magistrate decides to commit a prisoner for trial to the Quarter Sessions or Assizes, it is his duty to ask the prisoner if he wishes to make any

(*n*) *R.* v. *Wild*, 1 Moo. C. C. 452.
(*o*) *R.* v. *Sleeman*, Dears. 269.
(*p*) *R.* v. *Blackburn*, 6 Cox, 333.
(*q*) *R.* v. *Sexton*, Russell on Crimes, 2180.
(*r*) *R.* v. *Green*, 6 C. & P. 655.
(*s*) *R.* v. *Lloyd*, 6 C. & P. 393; Cockle, 187.
(*t*) *R.* v. *Shaw*, 6 C. & P. 372.
(*u*) *R.* v. *Spilsbury*, 7 C. & P. 187.

statement, but he is bound to caution him at the same time in these words, or words to the like effect:—

"Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial" (*x*).

The magistrate must also add words which give the prisoner clearly to understand that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt; but whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat.

Whatever the prisoner says will be taken down in writing and read over to him, and be signed by the magistrate, and kept with the depositions of the witnesses, and will be transmitted with them to the Clerk of the Court in which he will be tried. It is known as the "prisoner's statement." It is not a deposition, for it is not on oath (*y*). At the subsequent trial this statement may be given in evidence by the prosecution, unless the prisoner can show that the magistrate purporting to sign the same did not in fact sign the same. The usual course is for the counsel for the prosecution to put this statement in evidence as part of his case, whether it tells against the prisoner or in his favour.

A voluntary remark made by a prisoner before the depositions are complete, and before the statutory caution has been given, is admissible (*z*). And a letter written by the prisoner, whilst in custody, to the prosecutrix, was held admissible in evidence against him, although there was no evidence that he had been warned that any letter he wrote might be given in evidence (*a*).

(*x*) Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 18.
(*y*) Though now, of course, the prisoner may if he thinks fit give evidence on oath before the magistrate.
(*z*) *R.* v. *Stripp*, Dears. 648; *R.* v. *Sansome*, 1 Den. 545.
(*a*) *R.* v. *Heal*, 69 J. P. 224.

When a confession is inadmissible, every statement or act, which presumably and reasonably flows from it will be also inadmissible in evidence; for it is held that the influence which produces a groundless confession may also produce groundless conduct (*b*). But although a confession may be inadmissible, yet it seems that a witness may be asked whether, in consequence of something which the prisoner had said, he has made any discovery of other facts which bear on the case. Thus, where a prisoner told a police constable, under circumstances making the statement inadmissible, that he had thrown a lantern into a certain pond, the constable was allowed to be asked whether he searched for the lantern in that pond, and whether the prisoner had told him that he had thrown it there (*c*).

If two persons be charged jointly, the confession of one will not be evidence against the other, for a prisoner is called upon to answer what has been stated on oath by the witnesses called by the prosecution, but not to make any answer to the statement of another prisoner (*d*). And now where one of two prisoners, jointly indicted, gives evidence under the Criminal Evidence Act, 1898, and in so doing incriminates the other prisoner, the latter is entitled to cross-examine the former (*e*). So on an indictment for receiving stolen goods, any confession of guilt made by the thief when charged with the crime, and indeed everything said by the thief behind the back of the receiver, is inadmissible against the latter; and the jury must disregard the fact that, as sometimes happens, they have just heard the thief plead guilty to the larceny (*f*).

A principal is not as a rule criminally responsible for the act of his agent, nor an agent for the act of

(*b*) *R.* v. *Jenkins*, R. & R. 492.

(*c*) *R.* v. *Gould*, 9 C. & P. 364; Cockle, 185. Other cases appear inconsistent with this: *e.g.*, *R.* v. *Warwickshall*, 1 Leach, 263.

(*d*) *Per* PATTESON, J., in *R.* v. *Swinnerton*, Car. & M. 593; *R.* v. *Appleby*, 3 Stark. 33.

(*e*) *R.* v. *Hadwen*, [1902] 1 K. B. 882.

(*f*) *R.* v. *Smith*, 18 Cox, 470.

his principal; and therefore neither can be affected by a confession made by the other. Thus, on Lord Melville's impeachment for malversation of the public moneys, it was held that admissions by his agent to the effect that he had received money on account of his principal only affected the principal with a civil liability, and were therefore inadmissible when the principal was charged with a crime (*g*).

A prisoner may be convicted on proof of a confession without other evidence (*h*); but judges are unwilling to direct a conviction in such cases. Instances are common in which prisoners, under the influence of a morbid sentiment, have confessed to crimes which they have never committed; and there are other cases in which the confession seems to have been prompted by the sincere, but unfounded, belief in the confessing party that he had committed the crime. It has been said that—

"Too great weight ought not to be attached to evidence of what a party has been supposed to have said; as it very frequently happens, not only that the witness has misunderstood what the party has said, but that, by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what the party really did say" (*i*).

Moreover, the conduct of the accused subsequent to the commission of the crime may be proved and used against him, if it be such as to lead to the reasonable inference that he acknowledges his case to be bad: *e.g.*, if he leaves his home and runs away, or if he induces another person to give false evidence for the defence, on the hearing of the case before the magistrate (*k*).

It still remains the law that statements are admissible which are made by an accused person in answer to questions put to him by a policeman or any other person in authority, unless they are

(*g*) 29 How. St. Tr. at p. 764.
(*h*) *R.* v. *Sullivan*, 16 Cox, 347.
(*i*) *Per* PARKE, B., in *Earle* v. *Picken*, 5 C. & P. 542, n.
(*k*) *R.* v. *Watt*, 20 Cox, 852.

induced by some threat or by the promise of some temporal advantage. But a practice has grown up, which is now consistently followed in criminal courts, of rejecting evidence of any confession so obtained, if the judge in his discretion thinks that the prisoner was subjected to any unfair pressure.

Thus, it has been laid down by HAWKINS, J., that the police have no right to put questions to a prisoner in custody which may tend to convict him, even after cautioning him; but it is in the discretion of the judge to admit or reject the answers given to such questions; that he should reject them if there is any reason to believe that a trap was being laid for the prisoner; and that persons about to be taken into custody ought not to be cross-examined by the police (*l*).

The law on the subject has been clearly stated by CHANNELL, J., in *R.* v. *Knight* (*m*), a case in which a post office detective questioned a suspected post office clerk for six hours in a private room, not allowing him out for a meal except under conditions equivalent to arrest, and, although he began by cautioning him in proper form, refusing to take his constant denials of the offence alleged against him, though repeated steadily for the first two hours. A confession obtained at the end of the six hours by these means was held inadmissible, the judge saying:—

"It is, I think, clear that a police officer or anyone whose duty it is to inquire into alleged offences as this witness here, may question persons likely to be able to give him information, and that whether he suspects them or not, provided that he has not already made up his mind to take them into custody. When he has taken anyone into custody, and also before doing so when he has already decided to make the charge, he ought not to question the prisoner. A magistrate or judge cannot do it, and a police officer certainly has no more right to do so. I am not aware of any distinct rule of evidence, that if such improper questions are asked, the answers to them are inadmissible, but there is clear authority for

(*l*) *R.* v. *Hested*, 19 Cox, 16.
(*m*) 20 Cox, 711.

saying that the judge at the trial may in his discretion refuse to allow the answer to be given in evidence, and in my opinion that is the right course to pursue."

The mere fact that a prisoner's statement is made by him in reply to a question put to him by a police constable after he is in custody does not of itself render the statement inadmissible in evidence (*n*). So, a statement made by a person to a constable in answer to an inquiry by the constable is admissible in evidence on subsequent criminal proceedings against such person although no caution was given by the constable, provided that the person was not at the time in custody on the charge, that the constable on making the inquiry had not formed the intention of instituting proceedings whatever the answer might be, and that no inducement was held out or threat made to induce such person to make the statement (*o*).

(*n*) *R.* v. *Best*, [1909] 1 K. B. 692; and see *Rogers* v. *Hawken*, 78 L. T. 655; and *R.* v. *Rose*, 78 L. T. 119.

(*o*) *Lewis* v. *Harris*, 110 L. T. 337, followed in *R.* v. *Voisin*, [1918] 1 K. B. 531.

CHAPTER VI.

WHAT THE PARTIES DID OR SAID IN OTHER TRANSACTIONS.

The acts and statements of either party in other transactions or upon other occasions are, as a rule, inadmissible in evidence, as they generally afford no ground for any inference respecting the matter in issue. There is usually no reason to infer that, because a person acted in a certain manner on a certain occasion, he acted in the same manner on another occasion.

But there are cases in which things done or said by a party in some other transaction may lead up to or explain the transaction in issue, *e.g.*, by showing a series of acts or events, a systematic course of conduct, or a state of mind such as guilty knowledge, good faith or malice, intention, and in a few instances motive. When such is the case, evidence of these acts or statements is admissible if they bear closely on the matter in issue. But in all other cases evidence irrelevant to the issue will be excluded.

The parties cannot for obvious reasons be permitted to wander off into a discussion as to what they said and did on other occasions. Much time would be wasted and much unnecessary expense incurred, if the Court allowed

them thus to raise issues which are merely collateral. Thus in an action for the price of goods sold and delivered, it is wholly immaterial that the defendant owes money to other tradespeople besides the plaintiff. But suppose that A. has ordered goods on behalf of B. which the plaintiff has delivered to B., and that B. now refuses to pay for these goods on the ground that A. had no authority to order them on his behalf. Here, the burden rests upon the plaintiff to satisfy the Court that A. had authority, expressed or implied, to contract in the name of B.; and for this purpose he will be allowed to prove that on other occasions, both previous and subsequent, A. had ordered other goods, from himself and also from other tradesmen, for which B. had paid without demur. So if it be necessary to prove that A. on a given occasion held a particular office, or acted in a special capacity, evidence is, as a rule, admissible to show that he held that office or acted in that capacity on other occasions.

In divorce suits the Court will receive evidence of adultery committed after the latest act charged in the petition, to show the character and tendency of the earlier acts of familiarity (*a*). So on a charge of incest, evidence of previous acts of immorality between the parties was admitted to show what were the relations between them (*b*).

The majority of the cases which fall under this head may be grouped in four classes:—

(1) Acts of ownership.
(2) Facts showing system.
(3) Facts showing the state of mind of a party.
(4) Facts showing identity.

1. *Acts of Ownership.*

A party to an action is sometimes allowed to give

(*a*) *Boddy* v. *Boddy*, 30 L. J. P. M. & A. 23.
(*b*) *R.* v. *Ball*, [1911] A. C. 47.

in evidence acts which tend to show that he is the owner of or possesses certain less extensive rights (such as manorial rights and easements) over lands, not in dispute in the action, as proof that he owns or has the same rights over the land which is actually in dispute. But before he can do this, he must first satisfy the judge (*c*) that the following two conditions have been fulfilled :—

(a) That the acts are such that the jury may draw from them the inference that the person who did them owned or had the rights he claimed over the lands on or over which they were done ; and

(b) that these lands and the land in dispute have such a "unity of character," or are so intimately connected that the jury may come to the conclusion that whoever owns or has rights over the former also owns or has the same rights over the latter.

If the judge decides that these conditions have been fulfilled, then it is for the jury to determine what weight is to be given to those acts.

(a) It is not easy to define precisely what acts will be deemed acts of ownership. Where a person is proved to have been in possession, he is deemed to be the owner ; and therefore all acts, which show that the person who did them was in possession of the land on his own behalf, are acts of ownership. They include :—a conveyance of the freehold (*d*), or a lease of the land (*e*), or of the mines and minerals under the land (*f*), inclosing the

(*c*) *Doe* v. *Kemp*, 7 Bing. at p. 336.
(*d*) *Doe* v. *Kemp*, (Ex. Ch.) 2 Bing. N. C. 102.
(*e*) *Tyrwhitt* v. *Wynne*, 2 B. & Ald. 554.
(*f*) *Taylor* v. *Parry*, 1 Man. & G. 604.

land (*g*) or putting up boundary stones (*h*), depasturing cattle or sheep (*g*), planting or cutting trees or hedges (*i*), mending banks or repairing fences (*k*), building a jetty on a foreshore (*l*), and the like (*m*).

But evidence will not be admitted (*n*) of an act which is equivocal, such as the mere habit of walking across the land. And an act, which would be held to be an act of ownership if done by a private person, will not be received if done on behalf of a statutory body which has no power to own land (*o*).

(b) The land, river, highway or other subject-matter of the action must have a unity of character with the land to which the evidence relates.

Thus, in *Doe* v. *Kemp* (*p*), where the land in dispute between the lord of the manor and the plaintiff lay between the highway and the plaintiff's inclosed land, the lord was allowed to prove that he had conveyed other pieces of land lying on both sides of the same road and part of the same waste in order to show that he owned the disputed strip; but not that he had conveyed other pieces of land within the manor which also lay beside a road, but which he had not shown were part of the same waste. Lord DENMAN, C.J., said (*q*):—

"If the lord has a right to one piece of waste, it affords no inference, even the most remote, that he has a right to another in the same manor, although both may be similarly situated with respect to the highway. Assuming that all were originally the property of the same person, as lord of the manor, which is all that the fact of their being in the same manor proves, no presumption arises, from his retaining one part in his hands, that he

(*g*) *Doe* v. *Kemp*, *supra*.
(*h*) *Jenkins* v. *Dunraven*, 62 J. P. 661.
(*i*) *Stanley* v. *White*, 14 East, 332; *Jones* v. *Williams*, 2 M. & W. 326; Cockle, 86.
(*k*) *Jones* v. *Williams*, *supra*.
(*l*) *Van Diemen's Land Co.* v. *Marine Board, etc.*, [1906] A. C. 92.
(*m*) And see *post*, pp. 109—111, 247.
(*n*) See *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401.
(*o*) *Duke of Newcastle* v. *Clark*, 8 Taunt. 626.
(*p*) 7 Bing. 336; 2 Bing. N. C. 102; and see *Dendy* v. *Simpson*, 18 C. B. 831; and *Coats* v. *Herefordshire County Council*, [1909] 2 K. B. 579.
(*q*) 2 Bing. N. C. at p. 107.

retained another; nor, if in one part of the manor the lord has dedicated a portion of the waste to the use of the public, and granted out the adjoining land to individuals, does it by any means follow, nor does it raise any probability, that in another part he may not have granted the whole out to private individuals, and they afterwards have dedicated part as a public road; but the case is very different with regard to those parcels which, from their local situation, may be deemed part of one waste or common; acts of ownership, in one part of the same field, are evidence of title to the whole; and the like may be said of similar acts on part of one large waste or common."

So, too, in a case in which the plaintiff claimed the whole bed of a river, he was allowed to prove that he had done acts of ownership upon the whole bed and both banks of the river lower down stream, where the river flowed between his land and that of a third person; and also that he had repaired the hedge which divided that third person's land from the river, as it formed a continuation of the hedge which divided defendant's land from the same river (*r*). PARKE, B., said (*s*):—

"The evidence of acts in another part of one continuous hedge, and in the whole bed of the river, adjoining the plaintiff's land, were admissible in evidence, on the ground that they are such acts as might reasonably lead to the inference that the entire hedge and bed of the river, and consequently the part in dispute, belonged to the plaintiff.

Ownership may be proved by proof of possession, and that can be shown only by acts of enjoyment of the land itself; but it is impossible, in the nature of things, to confine the evidence to the very precise spot on which the alleged trespass may have been committed; evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question as would raise a reasonable inference in the minds of the jury that the place in dispute belonged to the plaintiff if the other parts did.

So I apprehend the same rule is applicable to a wood which is not inclosed by any fence; if you prove the cutting of timber in one part, I take that to be evidence to go to a jury to prove a right in the whole wood, although there is no fence or distinct boundary surrounding the whole; and the case of *Stanley* v. *White* (*t*) I conceive is to be explained on this principle: there was a continuous belt of trees, and acts of ownership on one part were held to be admissible to prove that the plaintiff was the owner of another part on which the trespass was committed."

(*r*) *Jones* v. *Williams*, 2 M. & W. 326; see also *Stanley* v. *White*, 14 East, 332; *Earl of Dunraven* v. *Llewellyn*, 15 Q. B. 791.

(*s*) 2 M. & W. at p. 331.

(*t*) 14 East, 332.

And where a strip of land between inclosed ground and the highway communicates with open commons or other larger pieces of land, evidence of ownership of the commons or other lands is admissible to show that the strip does not belong to the owner of the inclosed land (*u*). On a claim to a several fishery over a large area, evidence that over certain parts of that area fishing rights exist which are inconsistent with a several fishery is admissible on the question whether the several fishery exists on the other portions of the area (*x*).

It is on this principle that evidence was admitted of the rights of tenants in one manor to prove the rights of tenants in another, where the manors belonged to the same lord and for centuries had been administered under one commission, and in each there were the same class of tenants who held their tenements by grants in the same words (*y*).

The two pieces of land must be closely connected both in character and locality. Consequently, where a canal company created by statute, having power to purchase lands, made a new cut through different lands belonging to different owners, it was held, on a question arising over 100 years later, that, as the making of the cut did not necessarily involve more than the purchase of the actual bed of the navigation, the fact that the company owned the bank of the cut where it ran through other lands was not admissible to show that the company also owned the bank at the point in dispute (*z*).

The principle is not confined to questions of the ownership of land. Thus on an indictment of a parish for non-repair of a highway, the prosecution may, in order to show that the road was a public highway, put in evidence an indictment of an adjoining parish for non-repair of the continuation of the same road, which was

(*u*) *Plumbley* v. *Lock*, 67 J. P. 237; *Grove* v. *West*, 7 Taunt. 39.
(*x*) *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401.
(*y*) *Rowe* v. *Brenton*, 8 B. & C. 758.
(*z*) *Hollis* v. *Goldfinch*, 1 B. & C. 205; and see *University College, Oxford* v. *Oxford Corporation*, 68 J. P. 470.

either prosecuted to conviction or submitted to; for the road, being continuous, could not have different characters in the two parishes (*a*). And where common rights are claimed over land now inclosed but formerly open, the plaintiff, on showing that it formed part of the common of the manor, may prove that he exercised common rights over other parts of the common (*b*).

2. *Facts showing System.*

Again, evidence of transactions which are not in issue is often admissible when it is alleged that a party has pursued a systematic course of conduct which explains his behaviour in the transaction in issue. The transactions relied on to show a systematic course of conduct must be proximate to the transaction in issue (*c*).

The principle as to facts which establish a systematic course of conduct is thus stated by Lord HERSCHELL, L.C., in *Makin* v. *Attorney-General for New South Wales* (*d*):—

"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

In that case the prisoners were indicted for the murder of a child entrusted to their care, and the

(*a*) *R.* v. *Inhabitants of Brightside Bierlow and others*, 19 L. J. M. C. 50.
(*b*) *Peardon* v. *Underhill*, 20 L. J. Q. B. 133.
(*c*) *Perkins* v. *Jeffery*, [1915] 2 K. B. 702.
(*d*) [1894] A. C. at p. 65; and see *R.* v. *Smith*, [1915] W. N. 309; 84 L. J. K. B. 2153.

question was whether evidence could be given that the bodies of other children had been found in the gardens of houses occupied by the prisoners. It was held that such evidence was properly received as establishing a course of conduct pursued by the prisoners.

Another illustration of this matter is afforded by a later case, in which the plaintiff sued a barber for negligence, alleging that he had contracted an infectious disease through the barber using razors and other appliances in a dirty and insanitary condition. In support of his case he tendered two witnesses who deposed that they had contracted a similar disease in the defendant's shop. It was held that, as the negligence alleged was not an isolated act or omission, but was a dangerous practice carried on by the defendant, the evidence was admissible (*e*).

Again, where prisoner was charged with obtaining money by a bogus advertisement offering employment, evidence to prove a guilty mind was accepted of there being found on him when arrested six letters, all similar to the letters in answer to the advertisement which were made the subject-matter of the charge, and of there being 281 more letters awaiting delivery to him at the post office; and this, although the last-mentioned letters had never been seen by the prisoner (*f*).

So where the prisoner left her lodgings without paying the landlady, and it was alleged that such conduct was part of a regular system by which the prisoner fraudulently obtained board and lodging, evidence of previous fraudulent departures from other lodgings without payment has been admitted as showing a systematic course of conduct (*g*). And where in an indictment for obscene words "the intention of corrupting the public morals" is alleged, evidence that other books of an

(*e*) *Hales* v. *Kerr*, [1908] 2 K. B. 601; and read especially the remarks of CHANNELL, J., at pp. 604, 605.

(*f*) *R.* v. *Cooper*, 1 Q. B. D. 19.

(*g*) *R.* v. *Wyatt*, [1904] 1 K. B. 188. See also *R.* v. *Walford*, 71 J. P. 215; *R.* v. *Mean*, 69 J. P. 27.

indecent and obscene character were found on the defendant's premises is admissible (*h*).

In *R.* v. *Rhodes* (*i*), where prisoner was indicted for obtaining eggs by fraudulently pretending by repeated advertisements that he was carrying on a substantial business, it was held that evidence was rightly admitted that persons other than the prosecutor had subsequently been deceived by similar advertisements, issued by the prisoner. Evidence of these advertisements was admitted on the ground that they formed part of a scheme to defraud persons by the pretence of carrying on an honest business.

3. *Facts Showing the State of Mind of a Party.*

In many cases the Court is only concerned with the acts of a party, and does not stay to inquire into the state of his mind when he did the act. In other cases, however, it is material to ascertain whether the party, at the time when he did the act, was aware of a certain fact or had formed a certain intention, or conceived a fraudulent design. It is proverbially difficult to discover what is passing in the mind of a man. Hence, for this purpose the strict rules of evidence are relaxed, and inquiry may be made into other transactions in which that party was concerned, if they throw any light on the transaction in issue. In short, whenever the state of mind in which a party did an act is material, anything which that party said or did in the transaction is admissible; and so is anything which he said or did in any other transaction,

(*h*) *R.* v. *Thomson*, 64 J. P. 456; approved by DARLING, J., in *R.* v. *Barraclough*, [1906] 1 K. B. at p. 212.

(*i*) [1899] 1 Q. B. 77; cf. *R.* v. *Rodley*, [1913] 3 K. B. 468; and *R.* v. *Kurasch*, [1915] 2 K. B. 749.

previous or subsequent, if it tends to explain the state of his mind when he did the act.

We will deal first with civil cases. In every action based upon a representation which is alleged to have been fraudulently made, the burden lies upon the plaintiff to give affirmative evidence as to the state of the defendant's mind at the time when he made the representation. Did he intend to mislead the plaintiff? Did he know that his representation was untrue? In order to answer these questions, the plaintiff is allowed to lay before the Court evidence of other similar representations fraudulently made by the defendant. Thus, in an action against a company to recover a sum of money obtained by them from the plaintiff through a fraud of the defendant's agent, committed with their knowledge and for their benefit, evidence of similar frauds committed on persons other than the plaintiff, by the same agent, in the same manner, with the knowledge and for the benefit of the defendant, was held admissible on behalf of the plaintiff (*k*).

In any action brought for libel or slander published on a privileged occasion, it lies upon the plaintiff to prove malice in the defendant, and for this purpose he may give in evidence any words, as well as any act, of the defendant, whether prior or subsequent to the publication sued on, which throw any light upon the condition of the defendant's mind at the date of that publication (*l*). Evidence of such other transactions may also be given in aggravation of damages. As Lord ESHER said, in *Praed* v. *Graham* (*m*), "The jury . . . are entitled to look at the whole conduct of the defendant from the time the libel was published down to the time they give their verdict." But the plaintiff is not entitled to call evidence to show

(*k*) *Blake* v. *Albion Life Assurance Society*, 4 C. P. D. 94; *Barnes* v. *Merritt*, 15 T. L. R. 419.

(*l*) *Pearson* v. *Lemaitre*, 5 Man. & G. 700; and see Odgers on Libel and Slander (5th edition), pp. 348 *et seq.*

(*m*) 24 Q. B. D. at p. 55.

that the defendant had a general disposition to libel people (*n*).

Again, whenever a defendant pleads insanity as a defence to an action of contract, it is not enough for him merely to prove that he was insane at the date of the contract; he must give some affirmative evidence to show that the plaintiff knew that he was insane. For this purpose it is admissible for the defendant to show by the evidence of third persons that his lunacy at or about the time of the contract was so obvious that everyone who had transactions with him must have been aware of it. Thus in *Beavan* v. *M'Donnell* (*o*), which was an action to recover a sum of money, paid by the plaintiff as a deposit on the purchase of an estate, on the ground that he was a lunatic and therefore incompetent to contract, evidence was received of his conduct before and after the transaction, to show that the lunacy was of such a character as would be apparent to the defendant when dealing with him.

So in criminal cases, the leading principle is that evidence of all matters which are irrelevant to the issue will be excluded. But to this there is the exception that evidence will be admitted of any facts which tend to explain or throw light on the transaction in issue, as, for instance, to establish a systematic course of conduct, or to show criminal intention or guilty knowledge in the mind of the accused, or to rebut the defence that the criminal act was done accidentally or undesignedly. Our law, for instance, is, as a rule, extremely careful in criminal cases not to allow any evidence to be given, until after conviction, of any other offences committed by the prisoner or of any previous conviction recorded against him. Nevertheless, such

(*n*) *Scott* v. *Sampson*, 8 Q. B. D. 491.
(*o*) 10 Ex. 184.

evidence will be admitted when it is necessary to determine in what mind (*quo animo*) or with what intention he did the act with which he is charged. But evidence as to any charge previously made against the prisoner but subsequently abandoned should not be admitted (*p*). And then not only is such evidence admissible in chief as part of the case for the prosecution, but if the prisoner elects to give evidence on oath, he may be cross-examined on such matters.

Thus, if a prisoner is charged with knowingly passing bad coins, evidence of his passing bad coins on the previous day, or of any other bad coins being found on him at the time of his arrest, would be admissible (*q*). And upon an indictment for uttering a forged banknote, knowing it to be forged, evidence is admissible (to show the prisoner's knowledge that the note mentioned in the indictment was a forgery) of his having a short time previously uttered another forged banknote of the same manufacture, and of there being a number of others also of the same manufacture in circulation with prisoner's handwriting on the back of them (*r*). And on a charge of forging and uttering a deed, evidence was held rightly admissible as to other deeds subsequently forged by the accused, in order to prove guilty knowledge (*s*).

In cases of arson, evidence may be properly given of previous fires that prisoner has experienced on his premises (*t*), and of any suspicious circumstances attending such previous fires, if such evidence shows the state of his mind at the time the alleged offence took place. In poisoning cases, evidence may be given of previous deaths

(*p*) *R.* v. *Barron*, 110 L. T. 350.
(*q*) *R.* v. *Jarvis*, 7 Cox, 53.
(*r*) *R.* v. *Ball*, 1 Camp. 324.
(*s*) *R.* v. *Mason*, 111 L. T. 336; and see *R.* v. *Kennaway*, [1917] 1 K. B. 25.
(*t*) *R.* v. *Gray*, 4 F. & F. 1102.

by poisoning in which the prisoner was implicated (*u*). So, if a person charged with embezzlement sets up as his defence that his omission to hand over to his employer the moneys which he had received for him was the result merely of forgetfulness, and that the corresponding errors in his accounts were accidental, it is open to the prosecution to give evidence of other non-payments not charged in the indictment, and of other errors, all telling against the interests of the employer (*x*).

With reference to the particular crime of receiving stolen goods, knowing them to have been stolen, The Larceny Act, 1916 (*y*), provides:—

"Whenever any person is being proceeded against for receiving any property, knowing it to have been stolen, or for having in his possession stolen property, for the purpose of proving guilty knowledge there may be given in evidence at any stage of the proceedings—

(*a*) the fact that other property stolen within the period of twelve months preceding the date of the offence charged was found or had been in his possession;

(*b*) the fact that within the five years preceding the date of the offence charged he was convicted of any offence involving fraud or dishonesty.

This last-mentioned fact may not be proved unless—

(1) seven days' notice in writing has been given to the offender that proof of such previous conviction is intended to be given;

(2) evidence has been given that the property in respect of which the offender is being tried was found or had been in his possession."

On an indictment for obtaining, or attempting to obtain, money or goods by false pretences, it is necessary for the prosecution to give some affirmative evidence to show that the prisoner knew that his representation was false. Hence it is open to the prosecution, as in civil cases of fraud, to give evidence of any similar transaction, whether prior or subsequent in date (*z*), which throws

(*u*) *R.* v. *Geering*, 18 L. J. M. C. 215; Cockle, 99.

(*x*) *R.* v. *Richardson*, 2 F. & F. 343.

(*y*) 6 & 7 Geo. V. c. 50, s. 43 (1). A very similar provision was contained in the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 19; this section is repealed by the Larceny Act, 1916; and see *R.* v. *Rowland*, [1910] 1 K. B. 458.

(*z*) *R.* v. *Cooper*, 1 Q. B. D. 19.

light upon the state of the prisoner's mind, at the time when he made the false pretence charged in the indictment. Thus, where the prisoner was charged with attempting to obtain money by falsely pretending that a worthless ring was a diamond ring, evidence was admitted to show that two days before he tried to obtain money from two other persons by a similar assertion as to the same or a similar ring, and that on another occasion he obtained money from another person by pledging as a gold chain one which was only gilt (*a*). In another case a prisoner obtained money by giving cheques which were subsequently dishonoured. He was tried and acquitted on one charge, and next day charged on three other similar cases. To show guilty knowledge the prosecutor in the previous day's case was called, although in that case the jury had acquitted the prisoner of guilty knowledge; and his evidence was held rightly admitted (*b*).

But whenever it is sought to prove that the prisoner obtained goods by false pretences on one occasion by showing that he obtained other goods by false pretences on other occasions, the false pretences in such other cases must be of a similar character to the false pretences charged in the indictment (*c*). It is not enough if such evidence merely shows generally that he is a swindler (*d*). Thus, where the prisoner was accused of obtaining money by overstating the prices of goods which he had sold, it was held that evidence was inadmissible to show that he had sold china figures as Dresden china when he knew that they were not (*e*). The law is the same in cases of obtaining credit by fraud (*f*).

Such evidence is also admitted in cases of procuring abortion, providing there is sufficient connection between

(*a*) *R.* v. *Francis*, L. R. 2 C. C. R. 128.
(*b*) *R.* v. *Ollis*, [1900] 2 Q. B. 758. And see *R.* v. *Shellaker*, [1914] 1 K. B. 414; *R.* v. *Lovegrove*, [1920] 3 K. B. 643.
(*c*) *R.* v. *Boyle and Merchant*, [1914] 3 K. B. 339.
(*d*) *R.* v. *Fisher*, [1910] 1 K. B. 149; see 6 & 7 Geo. V. c. 50, s. 40 (1).
(*e*) *R.* v. *Ellis*, [1910] 2 K. B. 746.
(*f*) *R.* v. *Baird*, 113 L. T. 608.

the offence charged and the previous offences to establish a *course* of conduct. BRAY, J., in *R.* v. *Bond*, said:—

"A careful examination of the cases where evidence of this kind has been admitted shows that they may be grouped under three heads:—

(1) Where the prosecution seeks to prove a system or course of conduct.

(2) Where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or mistake.

(3) Where the prosecution seeks to prove knowledge by the prisoner of some fact" (*g*).

4. *Facts Showing Identity.*

The subsequent conduct of the prisoner may often establish his identity. Thus, where two boys charged a man with acts of gross indecency and also stated that he had made an appointment with them at a certain time and place three days later, the fact that the prisoner was the man who turned up at that time and place and gave the boys money was admissible as evidence that the prisoner was the man who had committed the crime (*h*).

General Evidence of Character.

Evidence of general good or bad character must be carefully distinguished from evidence of previous offences or previous convictions or special instances of misconduct on other occasions. General evidence of a prisoner's bad character or reputation cannot be given to show his state of mind at the time when he did a criminal act; still

(*g*) [1906] 2 K. B. at p. 414.

(*h*) *Thompson* v. *R.*, [1918] A. C. 221, followed in *R.* v. *Twiss*, [1918] 2 K. B. 853.

less can evidence that he has a general tendency or disposition to commit a certain class of crimes (*i*).

The prosecution can never in the first instance give evidence that the prisoner bears a bad character. The prisoner, on the other hand, may always give evidence at the trial that he has hitherto borne a good character; but, if he does so, it will then be open to the prosecution to show the contrary, if it can (*k*). Moreover, by s. 1, sub-s. (f), of the Criminal Evidence Act, 1898, if the prisoner elects to give evidence on oath, and when in the box asserts his own good character, or gives evidence against any other person charged with the same offence, or if the nature or the conduct of the defence involves imputations on the character of the prosecutor or his witnesses, he may be asked, and will be required to answer, not only questions tending to show he has been guilty of other offences or been previously convicted, but also questions to show that he is of bad character generally (*l*). Thus, if a prisoner goes into the witness box and voluntarily gives evidence that he was employed by a woman to do the alleged criminal acts, he may be questioned as to the relationship actually existing between himself and that woman (*m*). After conviction, moreover, it is customary for the prosecution to call witnesses as to the prisoner's general character and reputation for

(*i*) See the remarks of Lord HERSCHELL, L.C., in *Makin* v. *Attorney-General of New South Wales*, [1894] A. C. at p. 65, cited *ante*, p. 111; and see also *R.* v. *Fisher*, [1910] 1 K. B. 149.
(*k*) *R.* v. *Rowton*, 34 L. J. M. C. 57; L. & C. 520; Cockle, 109.
(*l*) These provisions are fully discussed, *post*, p. 177.
(*m*) *R.* v. *Kurasch*, [1915] 2 K. B. 749.

the information of the Court when determining the sentence to be passed (*n*),—for instance, to assist the Court to come to a conclusion whether a convicted prisoner over 16 and under 21 years of age should be recommended for the "Borstal system" or not (*o*).

Where a prisoner is indicted not only for an offence but also for being a "habitual criminal," the Court proceeds to the trial of the second charge after conviction on the first, and on that trial the Court may, if it thinks fit, permit evidence to be given of the prisoner's general character and repute as a part of the case for the prosecution (*p*).

In no other case can the prosecution give evidence of the general bad character of the prisoner.

Again, the general character or reputation of the prosecutor in any criminal case is, as a rule, wholly immaterial, nor can any independent evidence be given of it. If, however, he goes into the witness-box and gives evidence, he can, of course, be cross-examined as to credit like any other witness; but his answers generally cannot be contradicted (*q*). To this general rule, however, there is one exception. In cases of rape or indecent assault evidence may be given to show that the prosecutrix is of generally immoral character (*r*). She may be asked whether she has had connection with other men; but then the defence is bound by her answer, and cannot call evidence to contradict her (*s*).

(*n*) See, for example, *R.* v. *Nuttall*, 73 J. P. 30; *R.* v. *Whiteman*, *ibid.* 102; and *R.* v. *Edwards*, *ibid.* 286.

(*o*) Prevention of Crime Act, 1908 (8 Edw. VII. c. 59), Part I.

(*p*) Prevention of Crime Act, 1908, s. 10; and see *R.* v. *Turner*, [1910] 1 K. B. 346; *R.* v. *Waller*, *ibid.* 364.

(*q*) See *post*, p. 467; and *R.* v. *Biggin*, [1920] 1 K. B. 213.

(*r*) *R.* v. *Tissington*, 1 Cox, 48; and see, as to sentence, *R.* v. *Dickenson*, 73 J. P. 287.

(*s*) *R.* v. *Holmes*, L. R. 1 C. C. R. 334.

She may further be asked whether she has had connection with the prisoner on other occasions, and if she denies this, evidence may be called to contradict her (*t*), for this is relevant to the issue of consent or no consent. "Such evidence is in point as making it so much the more likely that she consented on the occasion charged in the indictment" (*u*).

In civil cases, evidence of good or bad character is generally irrelevant and inadmissible, unless character is of the substance of the issue. It is a defence to an action for breach of promise of marriage that the plaintiff at the date of the promise was a woman of general immoral character, unless the defendant was then aware of this. So, proof that the plaintiff, after the promise, became unchaste will release the defendant (*x*). In actions for seduction, evidence of the bad character of the person seduced is admitted in reduction of damages (*y*); but the evidence must refer to a time prior to the seduction. In actions for defamation, evidence of the plaintiff's general good character is held irrelevant, even though a justification is pleaded; unless his character is put in issue on the pleadings; or has been attacked by the cross-examination of the plaintiff or his witnesses; for till then the plaintiff's character is presumed to be good (*z*). Where the libel charged the plaintiff with incompetency as a surveyor, he was not allowed to travel out of the record by showing that he had, at other times, acted competently in that capacity (*a*). The defendant in an action for defamation can give general evidence of the plaintiff's bad character, subject to the provisions of Order XXXVI., r. 37, of the R. S. C. 1883, which is as follows:—

"In actions for libel or slander, in which the defendant does not by his defence assert the truth of the statement complained of, the

(*t*) *R.* v. *Riley*, 18 Q. B. D. 481.
(*u*) *Per* Lord COLERIDGE, C.J., *ibid.* at p. 484.
(*x*) *Jones* v. *James*, 18 L. T. 243.
(*y*) *Verry* v. *Watkins*, 7 C. & P. 308; Cockle, 108.
(*z*) *Cornwall* v. *Richardson*, Ry. & M. 305.
(*a*) *Brine* v. *Bazalgette*, 3 Ex. 692.

defendant shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence."

Although general evidence of reputation is admissible, evidence of rumours and suspicions to the same effect as the defamatory matter complained of is not admissible; nor is evidence of particular facts or circumstances tending to show the disposition of the plaintiff (*b*).

The preceding rules determine what facts are relevant in legal proceedings. But, as the case proceeds, evidence which was at first irrelevant may become admissible. For example, although as a rule no evidence may be given in criminal cases of the prisoner's bad character or previous convictions or other offences (*c*), yet as we have just seen the prisoner's conduct of his case may render such evidence admissible. In a civil case, too, reckless cross-examination may let in evidence which was not admissible in chief. Thus, if a witness be cross-examined as to part of a conversation with a third person on an occasion when the parties were not present, he may be asked in re-examination to give the whole conversation. Again, if an entry in a book be tendered in evidence, or a witness uses a book to refresh his memory, and the cross-examining counsel takes the book and asks questions about other entries in it, he makes those other entries evidence as part

(*b*) *Scott* v. *Sampson*, 8 Q. B. D. 491; *Bell* v. *Parke*, 11 Ir. C. L. Rep. 413. See further on this matter Odgers on Libel and Slander (5th edition), pp. 391—394.

(*c*) For the rule and exceptions, see *ante*, pp. 119—121.

of his case (*d*). So, too, if part of a document be put in evidence, the adverse party is entitled to have read all other passages which are connected with or qualify or explain the passage which has been read (*e*), but he is not entitled to have read any passages which have nothing to do with it (*f*). If a letter be put in, the reply also becomes admissible. Moreover, statements which are irrelevant may be let in, either by the other party not objecting in time (*g*) or by his express consent.

Lastly, it may not be out of place to mention here that matters clearly relevant may sometimes be excluded either on grounds of public policy (*h*), or out of regard to public decency. Thus, in former days the Court would not allow a husband to say that a child born of his wife after marriage was illegitimate (*i*), nor a wife to prove non-access, except in the Divorce Court (*k*). But now this strict presumption of legitimacy may be rebutted by evidence of the conduct and statements of the spouses (*l*). These matters are discussed in a subsequent chapter (*m*).

(*d*) *Gregory* v. *Tavernor*, 6 C. & P. at p. 281.
(*e*) *R.* v. *Mullarkey*, 14 Cr. App. Rep. 44.
(*f*) See *Darby* v. *Ouseley*, 1 H. & N. 1.
(*g*) *Robinson* v. *Davies*, 5 Q. B. D. 26.
(*h*) See *post*, pp. 209, 248.
(*i*) *Guardians of Nottingham* v. *Tomkinson*, 4 C. P. D. 343; but see *Poulett Peerage Case*, [1903] A. C. 395.
(*k*) Evidence Further Amendment Act, 1869, s. 3.
(*l*) *Aylesford Peerage Case*, 11 App. Cas. 1.
(*m*) See Book II., Chap. IV.

BOOK II.

PROOF.

CHAPTER I.

DIFFERENT KINDS OF PROOF.

It has been already pointed out that, as the day of trial draws near, each litigant must ask himself two important questions :—

(i.) What facts shall I be allowed to put in evidence before the Court at the approaching trial ?

(ii.) In what way or ways will the Court allow me to prove those facts ?

With the first question we have already dealt. In this Book we will discuss the different methods by which the Court permits a party to prove a relevant fact. In other words, we now pass from Relevancy and proceed to consider Proof.

It is most important always to bear in mind the distinction between these two branches of the Law of Evidence. Everything that is irrelevant will be rigorously excluded at the trial. And all relevant facts must be proved in a legitimate way ; a fact may be most material, still that is no reason why either party should be allowed to prove it by hearsay evidence. Counsel, when laying their client's

case before the Court, must not only keep rigidly to what is relevant, they must also be prepared to prove all relevant facts by admissible evidence. Henceforward in this volume we shall take it for granted that every fact, the method of proving which we are considering, is admittedly relevant.

"Different kinds of evidence may be used to prove the same fact" (*a*). Thus, if the defendant to an action of debt has pleaded payment, he may prove that he paid the debt in several ways. He can go into the box and swear that he paid it in cash on a particular day to the plaintiff or his agent, giving details if required as to the place where, as to the coins in which, he paid it, who was present, etc. Or he may produce a receipt signed by the plaintiff, or prove that the plaintiff had verbally admitted to some third person that he had been paid. Or, if the facts admit, he may do all three of these; for the existence of documentary evidence will not exclude the oral. So the handwriting of a document may be proved in five different ways (*b*), some of which are more cogent and convincing than others. It has often been laid down that "the best evidence only is receivable in our Courts." But this maxim is misleading unless it be considerably qualified and explained (*c*). It certainly does not mean that a judge can exclude one method of proving a fact merely because he regards another method of proving the same fact as more satisfactory.

Every fact must be established by the evidence of witnesses, or of documents, or of things other than documents—that is, by oral, documentary, or real evidence. But a witness is not allowed to give in evidence every fact which he regards as throwing

(*a*) *Per* Lord ESHER, M.R., in *Lucas* v. *Williams*, [1892] 2 Q. B. at p. 116.

(*b*) See *ante*, p. 44.

(*c*) For a discussion of this topic, see *post*, pp. 308, and 427—429.

light upon the question in dispute. He must confine himself to answering the questions asked by counsel. Many a witness is greatly disappointed because he is not permitted to state in open Court matters which he regards as most material. What other people told him, for instance, will be excluded (*d*). Again, not every writing which contains some reference to the matter in dispute is admissible in evidence as "a document in the case" (*e*). Some documents are primary evidence, some are secondary evidence, some are not evidence at all, though a layman might deem them material.

Whether a fact be established by the evidence of witnesses or of documents or of things, the evidence must be either direct or circumstantial —in other words, it must either go straight to establish the fact in issue or it must tend to prove certain minor facts, the combined effect of which is to establish the fact in issue. Again, if we look at the nature of such oral, documentary, or real evidence, we shall find that each piece of it must be either primary or secondary—that is, either the original witness, document or thing is produced in Court (this is primary evidence) or only some report, copy or model (this is secondary evidence).

Secondary evidence, on its production, discloses the fact that there is, or once was, evidence in existence superior to itself. Thus, one man's recollection of what another said, or a copy of a material document, is secondary evidence. In other words,

(*d*) Except in the cases specified in Book II., Chap. VIII., *post*, p. 261.

(*e*) See *post*, pp. 153, 154, 307.

secondary evidence does not pretend to be original; it confesses that it is not the best evidence conceivable. But in certain circumstances it is admitted either for the sake of convenience, or for some reason of public policy, or because it is the best evidence obtainable. And here the maxim that the best evidence only is receivable applies in full force; and secondary evidence will not be admitted until it is clear to the judge that primary evidence is unobtainable.

The existence of direct evidence does not exclude circumstantial; nor will circumstantial evidence exclude direct. The presence of oral evidence will not exclude either documentary or real, nor will the existence of real evidence exclude either oral or documentary. But the existence of documentary evidence does in some cases exclude oral (*f*); and the existence of primary evidence does as a general rule exclude secondary (*g*). Secondary oral evidence, which is usually called "hearsay," will not, as a rule, be admitted even where there is no primary oral evidence available (*g*). Secondary documentary evidence, on the other hand, is generally admitted, if the corresponding primary evidence cannot be produced (*i*).

It is not necessary to prove every fact "up to the hilt." The law prefers quality to quantity. If two credible witnesses have deposed to a certain fact and have not been shaken in cross-examination, it is not necessary, nor is it always expedient, to go

(*f*) See Book II., Chap. III., p. 149.
(*g*) See Book II., Chap. VIII., p. 261.
(*i*) See Book II., Chap. IX., p. 307.

on calling other persons who were present; their evidence may only weaken that which has already been given. *Primâ facie* proof is, as a rule, sufficient.

Thus, if a letter be properly addressed to A., and posted, with the postage prepaid, and if it has not been returned through the Dead Letter Office, the jury will infer—almost as a matter of course—that A. received it; and the burden rests on A. to prove that he did not (*k*). The jury will also infer that A. received it at the time at which it would be delivered in the ordinary course of postal business. The sender is never held answerable for any delay in the post (*l*), and indeed by several statutes proof of the posting of a properly addressed and prepaid envelope containing a notice is to be deemed sufficient service of that notice (*m*).

Again, it is not necessary to call a witness who can swear that he did post that particular letter. It is generally enough if the writer of the letter can swear that he handed it to the clerk whose duty it was to carry letters to the post (*n*), or even that he placed the letter in question in the post-bag, box, or other receptacle in which his business letters were always placed if they were intended to be posted. In the latter case it is usual to call a clerk to state that at regular intervals he, every day, carried to the post all letters placed in that receptacle. From this evidence the jury will generally infer that the letter was posted, though it is open to them not to do so (*o*). So, whenever a letter is sent by hand and delivered at the office or residence of the person to whom it is addressed, or handed to any clerk or servant of his, it will be assumed, until evidence to

(*k*) *Warren* v. *Warren*, 1 C. M. & R. 250.

(*l*) *Stocken* v. *Collin*, 7 M. & W. 515; *Ward* v. *Lord Londesborough*, 12 C. B. 252.

(*m*) See, for instance, Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 146; Interpretation Act, 1889, s. 26.

(*n*) *Hetherington* v. *Kemp*, 4 Camp. 193; Cockle, 83.

(*o*) As to post-marks, see *post*, p. 338.

the contrary is given, that the letter reached the hands of the person for whom it was intended (*p*). Again, where attestation is necessary to the validity of a document, and the signature to it has been witnessed by two or more attesting witnesses, it is sufficient to call one only, unless more than one is required by law; and, if all the attesting witnesses be dead, it is sufficient to prove the handwriting of any one.

Several statutes have been passed which render *primâ facie* proof sufficient. Thus, the "Law List" is admissible as *primâ facie* evidence that everyone whose name appears in it as a solicitor is qualified to practise (*q*). The "Medical Register" is *primâ facie* evidence that the persons specified therein are duly registered medical practitioners (*r*). A certified copy of an entry in the "Register of Newspaper Proprietors" kept at Somerset House is "sufficient evidence of all matters and things thereby appearing, unless and until the contrary thereof be shown" (*s*). And various statutes have rendered *primâ facie* evidence as to the age of a child sufficient (*t*).

Some facts, however, need not be proved at all. Such, for instance, are the common law of England, public statutes, official seals (*u*), and certain facts so well known that the court takes judicial notice of them without proof (*x*). It is impossible for judges, when trying a case, to shut their eyes to the ordinary course of nature (*y*), or to facts which constantly occur in daily life. They need no proof,

(*p*) *Macgregor* v. *Keily*, 3 Ex. 794.
(*q*) 23 & 24 Vict. c. 127, s. 22.
(*r*) 21 & 22 Vict. c. 90, s. 27.
(*s*) 44 & 45 Vict. c. 60, s. 15.
(*t*) See *post*, p. 142.
(*u*) There are several statutes as to judicial notice of certain official seals and signatures, which are set out, *post*, p. 219.
(*x*) See *Stockdale* v. *Hansard*, 7 C. & P. 731, 736; and *R.* v. *De Berenger*, 3 M. & S. 67, 69.
(*y*) *E.g.*, the length of the period of gestation, *R.* v. *Luffe*, 8 East, 193; Cockle, 21; and the fact that rain falls, *Baten's Case*, 9 Rep. 53 a; *Fay* v. *Prentice*, 1 C. B. 828.

therefore, of the ordinary public holidays, weights and measures, the laws of nature or the meaning of ordinary English words. But dictionaries are constantly referred to in court for the meanings of words, especially in trade-mark cases (*z*). So are other works of accepted authority, such as scientific or professional treatises. And, in a recent case, reports of the celebrated engineer Brunel, which were commonly accepted by engineers as accurate, were admitted as evidence (*a*). Again, no party need prove any fact which the law already presumes in his favour (*b*), nor in a civil case any fact which his opponent has admitted on the pleadings (*c*) or is estopped from denying (*d*).

The courts will take notice without proof of all the public statutes of the realm (*e*); and indeed of every statute passed since 1850, unless the contrary is expressly provided by such statute (*f*); also of their own course of procedure and practice, and of the procedure and privileges of both Houses of Parliament (*g*); of the maritime law of nations (*h*); of the existence of a war in which this country is engaged (*i*); of the great and privy seals (*k*); of royal proclamations; of the signature of the Clerk of the Parliaments (*l*); of standard almanacs and the *London Gazette*; of the signature to any judicial or official document of any judge of a superior court, but not

(*z*) *R.* v. *Peters*, 16 Q. B. D. 636.
(*a*) *East London Rail. Co.* v. *Conservators of River Thames*, 90 L. T. 347.
(*b*) See Book II., Chap. XI.
(*c*) See Book II., Chap. XII.
(*d*) See Book II., Chap. XIII.
(*e*) *Pugh* v. *Robinson*, 1 T. R. 116.
(*f*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 9.
(*g*) *Stockdale* v. *Hansard*, 9 A. & E. 905.
(*h*) *Chandler* v. *Grieves*, 2 H. Bl. 606, n.
(*i*) *Dolder* v. *Huntingfield*, 11 Ves. 292.
(*k*) *Lord Melville's Case*, 29 How. St. Tr. 707.
(*l*) *Badische Anilin, etc.* v. *Levinstein*, 4 R. P. C. 470.

of the Public Prosecutor (*m*). Should any question arise as to the status of a foreign sovereign or state, or the boundaries of any state, the Court usually inquires of a Secretary of State and acts upon the information thus informally received from him without judicial proof (*n*).

Again, our judges will not require proof of well-known mercantile usages, such as the negotiability of bonds to bearer, whether Government or trading bonds, and whether foreign or English (*o*); and of all general customs established by the course of judicial decision, *e.g.*, the custom of hotel keepers to carry on business with furniture which is not their own (*p*), and that, in the absence of special circumstances, bankers have a general lien on their customers' securities deposited with them as bankers (*q*).

But the Court will not take judicial notice of foreign or colonial law (*r*), or the custom of any particular county, or of a city such as London or Bristol, or the law of Scotland or Jersey, the practice of an inferior or foreign court, resolutions of the House of Commons (*s*), or the existence of a war between foreign countries: these must be proved as facts. The existence of a particular or local custom is a question of fact, and it is necessary to prove the custom in each case until it becomes so well known that the Courts take judicial notice of it (*t*). Customs of the City of London can be proved by the certificate of the Recorder, and when it has once been so certified the Court will take judicial notice of it (*u*).

(*m*) *R.* v. *Turner*, [1910] 1 K. B. 346; and see *post*, p. 219.

(*n*) *Mighell* v. *Sultan of Johore*, [1894] 1 Q. B. 161; *Foster* v. *Globe Venture Syndicate*, [1900] 1 Ch. 811.

(*o*) *Edelstein* v. *Schuler & Co.*, [1902] 2 K. B. 144.

(*p*) *Ex parte Turquand*, 14 Q. B. D. 636.

(*q*) *London Chartered Bank of Australia* v. *White*, 4 App. Cas. 422; *Brandao* v. *Barnett*, 3 C. B. 519.

(*r*) *R.* v. *Governor of Brixton Prison*, [1907] 1 K. B. 696. As to Colonial law, see *post*, p. 133. In the Privy Council, however, colonial statutes will be judicially noticed.

(*s*) *Stockdale* v. *Hansard*, 7 C. & P. 731, 736.

(*t*) *Per* CHANNELL, J., in *Moult* v. *Halliday*, [1898] 1 Q. B. 129; and see *George* v. *Davies*, [1911] 2 K. B. 445.

(*u*) *Crosbie* v. *Hetherington*, 4 M. & G. 933.

In order to afford facilities for more readily ascertaining the law administered in one part of His Majesty's dominions, when pleaded in the Courts of another part, the British Law Ascertainment Act, 1859 (*x*), provides that the Court in which the action is pending may prepare a case stating the questions of law which it desires to have settled, and remit it to a superior court in the district where such law is in force for its opinion. When an opinion has been thus obtained, it will be treated as evidence, or conclusive evidence as the Court may think fit, in the action.

Under this Act the law of Scotland has been ascertained by a case remitted to the Court of Session in Scotland (*y*), and the law of Bengal by a case remitted to the Supreme Court of Bengal (*z*).

Before we proceed to discuss the nature of the evidence by which each party must establish his case, it is necessary to determine on whom lies the burden of proving any particular issue.

(*x*) 22 & 23 Vict. c. 63, s. 1.
(*y*) *Lord* v. *Colvin*, 1 Drew. & Sm. 24.
(*z*) *Login* v. *Princess of Coorg*, 30 Beav. 632.

CHAPTER II.

BURDEN OF PROOF.

The judge or jury can decide a case only by considering the truth and value of the several facts alleged and proved by the parties. And as the facts are unknown to both judge and jury, each party must establish what he has alleged by evidence. The question at once arises, By which party must any particular fact be proved? The responsibility of adducing such evidence as will establish any fact in issue is called the "Burden of Proof."

The burden of proving a fact rests, as a rule, on the party who affirms the fact and not on the party who denies it. As a general rule, he who makes an assertion must prove it true. If no affirmative evidence be given, the opposite proposition, the negative of the issue, will be taken as established. The burden of proof is said to lie on A., when A. must either call some evidence or have judgment given against him.

As a rule, the *onus* of proof lies upon the party who has in his pleading maintained the affirmative of the issue; for a negative is usually incapable of proof. The affirmative is generally, but not necessarily, maintained by the party who first raises the

issue. Thus, the *onus* lies on the defendant, as a rule, to prove all facts which he has specially pleaded, such as fraud, performance, release, rescission, accord and satisfaction, etc. But the burden frequently shifts, as the case proceeds, from the person on whom it rested at first to his opponent. This occurs whenever a *primâ facie* case has been established on any issue of fact or whenever a rebuttable presumption of law has arisen.

In all cases it is necessary to determine the question, On whom does the burden of proof rest? in order that each litigant may properly prepare his case for trial. And on this preliminary question often depends another, which is of great importance at the trial, namely, Which party has the privilege, or incurs the duty, of beginning? Much depends upon the order in which the contending parties are allowed to state their cases to the Court. As a general rule, in any legal proceeding the burden of proof lies on the plaintiff or prosecutor; he therefore begins; it is his duty to establish the case against the defendant or the accused, and this he must do by calling proper evidence (*a*).

In a civil case, the question on whom does the burden of proof rest? depends upon the pleadings. At the beginning of the case the test is this: Which party would be unsuccessful if no evidence were given on either side (*b*)? And if at any stage of the action a question arises as to the party on whom should rest the burden of proving any particular allegation, the test is,

(*a*) "A judge has nothing to do with the getting up of a case," *per* MOULTON, L.J., *In re Enoch and Zaretzky*, [1910] 1 K. B. 327. He cannot call a witness of his own motion if either party objects: *ibid.*

(*b*) *Amos* v. *Hughes*, 1 M. & Rob. 464; Cockle, 125.

Which party would fail if the allegation in question were struck out of the pleading (*c*)?

The issue must be proved by the party who alleges the affirmative in substance, and not merely the affirmative in form. The precise form of the pleading does not matter; the judge will look at the substance of the allegation. Thus, in a plea of privilege it is immaterial whether the defendant pleads that he published the words *bonâ fide*, or that he published them "without malice"; in either case the plaintiff must prove malice, if the occasion be held privileged. So in *Amos* v. *Hughes* (*d*), where the plaintiff alleged that the defendant had not done certain work in a workmanlike manner, as the Court would not presume the work to have been done in an unworkmanlike manner, the plaintiff had to prove his allegation, as it was the affirmative in substance, although not so in form; and in an action for putting combustible goods on board the plaintiff's ship without due notice, it was held that the plaintiff was bound to prove that no notice was given, as the facts alleged constituted a criminal offence (*e*). Again, in an action for breach of a covenant to repair, if the plaintiff alleges that the premises were not kept in repair, and the defendant pleads that they were, the plaintiff must begin, and prove the non-repair (*f*). So, in ejectment by a landlord, on a breach of covenant by defendant to insure the premises, the burden of proof lies on the plaintiff (*g*). And when a person writes or prepares a will under which he benefits, the *onus* lies on him to show that it expresses the testator's intention (*h*).

In bankruptcy proceedings the burden is on the petitioning creditor to show that the debtor's domicil

(*c*) *Mills* v. *Barber*, 1 M. & W. 427.
(*d*) 1 M. & Rob. 464.
(*e*) *Williams* v. *East India Co.*, 3 East, 192; and see *Wakelin* v. *London and South Western Rail. Co.*, 12 App. Cas. 45; and *Pomfret* v. *Lancashire and Yorkshire Rail. Co.*, [1903] 2 K. B. 718.
(*f*) *Soward* v. *Leggatt*, 7 C. & P. 613; Cockle, 126.
(*g*) *Doe* v. *Whitehead*, 8 A. & E. 571.
(*h*) *Finny* v. *Govett*, 25 T. L. R. 186.

is in England (*i*); but if it is not disputed, he need not adduce evidence on the point in the first instance (*k*). The owner of the surface of land has a *primâ facie* right to have it properly supported from below, and the burden of proof is on any person claiming against such right (*l*). In a case where the plaintiffs had brought an action against the defendants for non-delivery of goods shipped under a bill of lading containing the usual exceptions, but not excepting negligence, the goods had been damaged by sea water through the stranding of the vessel, and the defendants claimed exemption from liability on the ground that the loss was occasioned by perils of the sea. To this the plaintiffs rejoined that, even if that were true, that peril of the sea was the result of negligent navigation on the part of the defendants' servants. It was held by the Court of Appeal that as the loss apparently fell within the exception, the burden of showing that the defendants were not entitled to the benefit of it, by reason of negligence, lay upon the plaintiffs. Lopes, L.J., in giving judgment, said:—

"It appears to me in this case that the burden of proving that the loss which has happened is attributable to an excepted cause lies on the person who is setting it up. That in this case would be the defendants, the shipowners. If, however, the excepted cause by itself is sufficient to account for the loss, it appears to me that the burden of showing that there is something else which deprives the party of the power of relying on the excepted cause lies on the person who sets up that contention. That in this case would be the plaintiffs, who are the shippers" (*m*).

Where a plaintiff sues for damages for negligence, he must prove such negligence; and where the defence of contributory negligence is set up, the burden of proving such contributory negligence is on the defendant; but if the contributory negligence is admitted by the plaintiff, or proved by the plaintiff's witnesses while establishing

(*i*) *Ex parte Cunningham*, 13 Q. B. D. 418.
(*k*) *Ex parte Barnes*, 16 Q. B. D. 522.
(*l*) *Love* v. *Bell*, 9 App. Cas. 286.
(*m*) *The Glendarroch*, [1894] P. 226; and see *Betts* v. *Willmott*, L. R. 6 Ch. 239.

negligence against the defendant, that is enough (*n*). But where goods have been lost or damaged while in the custody of a bailee or his servants, the *onus* lies on the bailee to show that the loss or damage did not arise from his negligence (*o*). This rule applies as much in the case of a gratuitous bailee as in that of a bailee for valuable consideration. In an Irish case, where a railway company were sued as carriers under a contract which exempted them from liability except for "wilful misconduct," it was held that unreasonable delay, even though entirely unexplained, did not amount to wilful misconduct, and that the burden was on the plaintiff to prove that the defendants intentionally delayed the goods (*p*).

In some cases the *onus* lies on one party, although the issue was first raised by his opponent. Thus, if a defendant pleads the Statute of Limitations, the *onus* lies on the plaintiff to prove that his cause of action arose within the prescribed period; it does not lie on the defendant to prove the negative.

There are, moreover, exceptions to the rule that the burden of proof lies on the party who affirms, not on him who denies. Thus, in an action for malicious prosecution it is for the plaintiff to establish that there was no reasonable or probable cause for the prosecution. It is not sufficient for him to prove the dismissal of the charge (*q*). So on an issue whether A. be still alive or not, the party asserting the negative, viz., that A. is not living, must prove his death; the presumption is in favour of the continuance of life, till the contrary be shown, or until seven years have elapsed since he was last heard of by those with whom he would naturally correspond if he were still alive. Again, in an action brought to enforce a contract into which the defendant alleges he was induced to enter by a representation made by the

(*n*) *Wakelin* v. *London and South Western Rail. Co.*, 12 App. Cas. 45.
(*o*) *Phipps* v. *New Claridge's Hotel, Limited*, 22 T. L. R. 49; *Bullen* v. *Swan Electric Engraving Co.*, 23 T. L. R. 258.
(*p*) *Graham* v. *Belfast Ry.*, [1901] 2 Ir. R. 13; but see *Chapronière* v. *Mason*, 21 T. L. R. 633, *post*, p. 147.
(*q*) *Abrath* v. *North Eastern Rail. Co.*, 11 App. Cas. 247.

plaintiff which is now proved to be false, the burden lies on the plaintiff to show that the defendant did not rely on it (*r*).

In a criminal case, the burden of proof always lies in the first instance on the prosecution; for the accused is presumed to be innocent. As the case proceeds, however, the burden of proof may shift to the prisoner (*s*). Thus, on a charge of murder the prosecution discharges the burden of proof, which lies upon it in the first instance, by simply proving that the prisoner caused the death of the deceased; it is then, in strict law, for the prisoner to prove, if he can, facts which will reduce his act to one of manslaughter or to justifiable or excusable homicide. But in practice it is usual for the prosecution to take upon itself the burden of proving affirmatively malice aforethought. On the other hand, cases constantly occur where the prisoner was found in possession of stolen goods shortly after they were stolen; here no presumption arises against him, and therefore the burden of proof does not shift (*t*).

There are many cases, moreover, in which the Legislature has enacted that, on proof of certain facts, a presumption shall arise against persons charged with certain criminal offences and imposes on them the burden of disproving their guilt. This is especially the case where the fact alleged by the prosecution is so exclusively or peculiarly within the knowledge of the accused, that it is practically impossible, or highly inconvenient for the party alleging it to prove it, and the Legislature therefore throws the burden of disproving it upon the accused.

Thus in the case of an offence against the Bankruptcy Act, 1914 (*u*), it is expressly enacted that on proof of certain acts done by a bankrupt he shall be deemed guilty, unless he can satisfy the jury that he did such

(*r*) *Redgrave* v. *Hurd*, 20 Ch. D. 1; and see *Melbourne Banking Corporation* v. *Brougham*, 7 App. Cas. 307, *post*, p. 144.
(*s*) See *R.* v. *Stoddart*, 73 J. P. 348.
(*t*) See *R.* v. *Abramovitch*, 112 L. T. 480, and *post*, pp. 335, 336.
(*u*) 4 & 5 Geo. V. c. 59, s. 154.

acts without any fraudulent intent. And he commits a misdemeanour if he does not fully disclose his assets to his trustee in bankruptcy; or deliver up his assets and accounts, or conceals any property to the extent of £10 or upwards, or any debt, or within four months before, or after, his bankruptcy, conceals, destroys or otherwise makes away with any books or documents or makes any false entries in them, or similar acts set out in the statute (*x*), "unless he proves that he had no intent to defraud"; and the task of satisfying the jury of this lies upon the defendant (*y*).

Again, it is a defence to a charge of bigamy if the accused can show that his wife or her husband has "been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time" (*z*). The burden of proving continual absence is laid on the accused, but as soon as that is discharged, then it is for the prosecution to prove that the accused knew that his or her spouse was alive during that time.

So, too, it was decided that, in all summary proceedings before magistrates, any defendant who claims a qualification to do an act which is forbidden by statute must prove the fact in his defence; the informer has not to prove the want of it, especially as the fact is peculiarly within the knowledge of the defendant (*a*).

In addition to the above decisions, the Legislature has, in a variety of cases, expressly thrown the burden of proving authority, consent or lawful excuse on the defendant in criminal proceedings. Thus, by the Summary Jurisdiction Act, 1879 (*b*), s. 39 (2), it is enacted that:—

"Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany in the same section the

(*x*) 4 & 5 Geo. V. c. 59, s. 154.
(*y*) *R.* v. *Thomas*, 11 Cox, 535; *R.* v. *Bolus*, 23 L. T. 339.
(*z*) 24 & 25 Vict. c. 100, s. 57; *R.* v. *Curgenwen*, L. R. 1 C. C. R. 1.
(*a*) *R.* v. *Turner*, 5 M. & S. 206; Cockle, 130.
(*b*) 42 & 43 Vict. c. 49.

description of the offence in the Act, order, bye-law, regulation, or other document creating the offence, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and, if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant."

An identical provision is contained in the Merchant Shipping Act, 1894 (*c*), and in several other statutes which create offences unknown to the common law. In the case of offences under s. 2 of the Merchandise Marks Act, 1887 (*d*), the burden of proof of the exemptions is thrown on the defendant. So, too, when a person is charged with making or possessing coining tools, under 24 & 25 Vict. c. 99, s. 24, without lawful authority or excuse, the burden of proving that he had such authority or excuse rests on him. The same principle is expressly imported into the Game Act, 1831 (*e*), which enacts that:—

"It shall not be necessary in any proceeding against any person under this Act to negative by evidence any certificate, licence, consent, authority, or other matter of exception or defence; but the party seeking to avail himself of any such certificate, licence . . . shall be bound to prove the same."

Under the Licensing Act, 1872 (*f*), the burden of proving that the person supplied was a *bonâ fide* traveller, rests on the defendant; but, by the Licensing Act, 1874 (*g*), if he fails in such proof, but the justices are satisfied that the defendant truly believed that the purchaser was a *bonâ fide* traveller, and further that the defendant took all reasonable precautions to ascertain whether or not the purchaser was such a traveller, the justices shall dismiss the case as against the defendant.

The burden of proving that he did not know that a ship, built by order of or on behalf of any foreign State when at war with a friendly State, was intended to be

(*c*) 57 & 58 Vict. c. 60.
(*d*) 50 & 51 Vict. c. 28.
(*e*) 1 & 2 Will. IV. c. 32, s. 42.
(*f*) 35 & 36 Vict. c. 94.
(*g*) 37 & 38 Vict. c. 49.

used and employed in the military and naval service of such foreign State, is thrown upon the builder of such ship by the Foreign Enlistment Act, 1870 (*h*); and by s. 24 of the Elementary Education Act, 1873 (*i*), when a child is apparently of the age alleged for the purposes of any legal proceedings under that Act, or the Elementary Education Act, 1870 (*k*), it shall lie on the defendant to prove that the child is not of such age. And by s. 3 of the Betting and Loans (Infants) Act, 1892, where such a document as mentioned in the previous sections (*l*) is sent to any person at any place of education, and such person is an infant, the person sending it, or causing it to be sent, shall be deemed to have known that such person was an infant, unless he proves that he had reasonable ground for believing such person to be of full age (*m*). By s. 123 of the Children Act, 1908, the opinion of the Court as to the age of a person (other than a witness) is binding for all purposes of the Act and offences under it or under Acts incorporated with it, unless the contrary be shown. And many of its provisions cast the *onus* of disproof on the accused in respect of particular matters (*n*). Similar provisions, which put on the accused the *onus* of proving certain facts or which raise presumptions against him, are contained in the Dangerous Performances Acts, 1879 (*o*) and 1897 (*p*), the Money-lenders Act, 1900 (*q*), and the Cruelty to Children Act, 1904 (*r*).

The general rule that the party who alleges an affirmative in substance must prove his allegation,

(*h*) 33 & 34 Vict. c. 90.
(*i*) 36 & 37 Vict. c. 86.
(*k*) 33 & 34 Vict. c. 75.
(*l*) 55 Vict. c. 4, ss. 1, 2.
(*m*) But see *Milton* v. *Studd*, [1910] 2 K. B. 118.
(*n*) 8 Edw. VII. c. 67, s. 123; and see ss. 14 (2), 38 (2), 120 (3). See also *R.* v. *Cox*, [1898] 1 Q. B. 179.
(*o*) 42 & 43 Vict. c. 34, s. 4.
(*p*) 60 & 61 Vict. c. 52.
(*q*) 63 & 64 Vict. c. 51, s. 5.
(*r*) 4 Edw. VII. c. 15, s. 17, as amended by 8 Edw. VII. c. 67.

is also subject to this exception—that where there is a presumption of law in favour of the party alleging a fact, it is incumbent on the other party to rebut such presumption. On proof of certain facts the law will sometimes infer the existence of another fact, which then need not be expressly proved. This presumption is rebuttable; that is, the other side may try to disprove it. But if they cannot do this, the law treats the fact presumed as proved. The presumption is not conclusive, but it shifts the burden of proof.

The plaintiff in an action of libel need not prove that the words complained of are false, for the law already presumes this in his favour; it is for the defendant to prove that they are true. The holder of a bill of exchange need not prove that he gave value for it; the law presumes that value has been given. This is recognised by s. 30 of the Bills of Exchange Act, 1882 (*s*), which provides as follows:—

"(1) Every party whose signature appears on a bill is *primâ facie* deemed to have become a party thereto for value. (2) Every holder of a bill is *primâ facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill."

In an action for goods sold and delivered, if the defendant pleads infancy, the *onus probandi* lies upon him; as the law presumes that, when a man contracts, he is of proper age to contract, until the contrary be shown (*t*). Again, there is a well-known presumption in favour of the regularity and validity of acts which is usually expressed in the maxim *Omnia præsumuntur rite*

(*s*) 45 & 46 Vict. c. 61.
(*t*) *Hartley* v. *Wharton*, 11 A. & E. 934.

esse acta. Thus, evidence that a man had acted as a constable was held sufficient to throw on the prisoner the burden of proving that he was not a constable (*u*). But, where an act is apparently tainted with illegality, the party justifying it must disprove its illegality. So a defendant in libel, who pleads that the alleged libel is a fair report of certain proceedings in a court of justice, must prove the correctness of the report (*x*).

Whenever it is alleged by a party to a deed or his privy that the recitals in such deed are untrue, the burden of proving their falsehood rests upon such party or privy, who is *primâ facie* bound by such recitals as admissions (*y*). Where a person sued upon a covenant in restraint of trade sets up its invalidity, it is for him to prove any facts showing that it is invalid (*z*). In patent cases the burden of proof of infringement is ordinarily on the patentee (*a*).

But although the general presumption in favour of validity of acts throws the burden of proof upon the party who impeaches the transaction, yet when a person who is able to exercise what has been termed "dominion" over another, takes a benefit from him, such person must prove that the transaction was a righteous one (*b*), and that the gift or other benefit was voluntary and not the result of undue influence (*c*). This rule is not confined to cases of parent and child, guardian and ward, solicitor and client, and the like, but extends to every case in which two persons are so situated that one may obtain considerable influence over the other. If, however, a married woman, who has purported to charge her separate property for

(*u*) *R.* v. *Gordon*, 1 Leach, 515.
(*x*) *Milissich* v. *Lloyd's*, 46 L. J. C. P. 404.
(*y*) *Melbourne Banking Corporation* v. *Brougham*, 7 App. Cas. 307.
(*z*) *Rousillon* v. *Rousillon*, 14 Ch. D. 351.
(*a*) *Neilson* v. *Betts*, L. R. 5 H. L. 1.
(*b*) *Cooke* v. *Lamotte*, 15 Beav. at p. 240; cf. *Allcard* v. *Skinner*, 36 Ch. D. 145.
(*c*) *Walker* v. *Smith*, 29 Beav. 396; cf. *Turner* v. *Collins*, L. R. 7 Ch. 329.

money advanced to her husband, alleges undue influence, she must prove it (*d*).

So, a Court always treats a deed or instrument, which is *primâ facie* good, as what it purports to be (*e*), and the *onus* of proving that it is not rests upon the party impeaching it (*f*). But where a will is propounded, there are two rules of law which are always acted upon :—

"The first that the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased" (*g*).

This second rule is not confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court (*h*).

Even where there is no legal presumption to assist the party on whom the burden of proof originally rests, nevertheless, it is not necessary for him to prove his case up to the hilt. He need not give all the evidence which it is possible for him to procure. It is sufficient if he has made out a *primâ facie* case (*i*). The burden of proof will then shift to the other party. And very little affirmative evidence will be sufficient where the

(*d*) *Field* v. *Sowle*, 4 Russ. 112.
(*e*) *Jacobs* v. *Richards*, 18 Beav. 303.
(*f*) *Nichol* v. *Vaughan*, 1 Cl. & F. 49.
(*g*) *Per* PARKE, B., in *Barry* v. *Butlin*, 2 Moo. P. C. 480.
(*h*) *Tyrrell* v. *Painton*, [1894] P. 151.
(*i*) As to *primâ facie* evidence of a particular fact, see *ante* pp. 128—130.

facts lie almost entirely within the knowledge of the other side (*k*).

But where the party on whom the *onus* lies of proving an allegation gives only evidence which is as consistent with one view of the case as with the other, he fails in his proof (*l*). This is so, even where his lack of affirmative evidence is caused by the death of his most important witness (*m*).

Thus, in an action for recovery of land, the defendant being in possession, it will be presumed in his favour that he is rightly in possession; therefore the plaintiff must begin. But as soon as the plaintiff proves that he is the heir-at-law of A., who was in possession of the land at the time of his death last year, the burden of proof is shifted. It is now for the defendant to produce A.'s will, and show a devise to himself. That is a *primâ facie* answer to the plaintiff's case, and the *onus* once more lies on him. The plaintiff must now give some additional evidence, *e.g.*, to show that A. was not of sound mind when he executed that will, or that he revoked it by a subsequent codicil.

Again, "where there is *primâ facie* evidence of any right existing in any person, the *onus probandi* is always upon the person or party calling such right in question" (*n*). Therefore, where there is a *primâ facie* right to light in the grantee of land, the burden of proving any limitation of such right is upon the grantor who alleges it (*o*).

(*k*) *Hollis* v. *Young*, [1909] 1 K. B. 629.

(*l*) *Wakelin* v. *London and South Western Rail. Co.*, 12 App. Cas. 41; *Pomfret* v. *Lancashire and Yorkshire Rail. Co.*, [1903] 2 K. B. 718; *McDonald* v. *Owners of Steamship Banana*, [1908] 2 K. B. 926; and see *Low* v. *General Steam Fishing Co.*, [1909] A. C. 523, and *Hewett* v. *SS. Duchess*, 26 T. L. R. 300.

(*m*) Contrast *Bender* v. *Zent*, [1909] 2 K. B. 41; and *Marshall* v. *Wild Rose*, [1909] 2 K. B. 46; with *Rice* v. *Swansea Vale*, 26 T. L. R. 276.

(*n*) See the opinion of the judges in the *Banbury Peerage Case*, 1 S. & S. 155.

(*o*) *Broomfield* v. *Williams*, [1897] 1 Ch. 602.

The mere happening of an accident is not, in general, proof that it was due to negligence, still less that it was due to negligence on the part of the defendant (*p*), but, in certain cases where the cause of the accident is something in the exclusive management or control of the defendant or his servants, and the accident is such as does not happen in the ordinary course of things when due care is used, the plaintiff is entitled to damages for injuries caused by the accident, unless the defendant gives an adequate explanation, showing that it was not caused by want of care (*q*).

This rule is illustrated by the well-known case of *Byrne* v. *Boadle* (*r*). The plaintiff was walking along the highway past the defendant's premises, when, for some unexplained reason, a barrel of flour fell from an upstairs window and injured him. It was held that in such a case as this, the fact of the accident alone was sufficient to cast on the defendant the *onus* of showing that he used due care. If, however, the defendant could have shown, *e.g.*, that the fall was due to the wrongful act of a stranger, he would have discharged the burden (*s*). It has been held in the Court of Appeal that the presence of a stone in a bun is *primâ facie* evidence of negligence, and throws on the seller of the bun the burden of rebutting such negligence (*t*).

But the burden of proof will not shift until the party on whom it originally rests has made out a *primâ facie* case; and he does not do this if the evidence which he calls is equivocal and creates no preponderance of conviction in support of his

(*p*) *Cotton* v. *Wood*, 8 C. B. (N.S.) 568; *Hammack* v. *White*, 11 C. B. (N.S.) 594.

(*q*) *Scott* v. *London Dock Co.*, 3 H. & C. 596; *Christie* v. *Griggs*, 2 Camp. 79.

(*r*) 2 H. & C. 722; and see *Dominion Natural Gas Co.* v. *Perkins*, 101 L. T. 359.

(*s*) *Goodman* v. *Taylor*, 5 C. & P. 410; *Latch* v. *Rumner Rail. Co.*, 27 L. J. Ex. 155.

(*t*) *Chapronière* v. *Mason*, 21 T. L. R. 633.

contention. Thus if a libel be published on a privileged occasion, it lies upon the plaintiff to prove that the defendant acted maliciously; and he will not succeed in doing this if he gives evidence only of facts which are equally consistent either with *bona fides* (*u*) or with malice in the defendant (*x*).

(*u*) *Wheelton* v. *Hardisty*, 8 E. & B. at p. 263; cf. *Cotton* v. *Wood*, 8 C. B. (N.S.) 568.

(*x*) *Harris* v. *Thompson*, 13 C. B. 333; *Taylor* v. *Hawkins*, 16 Q. B. 308.

CHAPTER III.

EVIDENCE, ORAL AND DOCUMENTARY.

EVERY fact must be proved by one of the following methods; many facts can be proved by two or by all three of such methods :—

(i.) Oral evidence—the words which fall from the lips of living witnesses in open Court.

(ii.) Documentary evidence—words written, printed, or carved on any permanent substance, at or before the trial.

(iii.) Real evidence—a thing produced at the trial, other than a document.

But both documentary and real evidence generally require some oral evidence to make them admissible, by explaining what they are and how they are connected with the case.

We propose in this chapter to compare and contrast Oral and Documentary Evidence, and to explain the relations between them. Real Evidence will be discussed in Chapter X. (*a*).

Oral evidence is generally regarded as more satisfactory and convincing than documentary evidence. Juries certainly prefer to see a witness in the box and hear him cross-examined; they judge by his demeanour whether he is telling the truth or not. A colourless document read aloud by an officer of the Court makes much less impression

(*a*) See *post*, p. 324.

upon them. Moreover, a witness can always explain what he has not at first made clear, or correct any error in his evidence. But no one can cross-examine a document or add to its contents.

Documentary evidence differs from oral in another particular. When a man goes into the witness-box and gives evidence on oath, and is cross-examined thereupon, what he says is evidence both for and against the party calling him; it is primary evidence of the truth of what he states. But when a document is read aloud to the jury, it is evidence that the writer wrote those words and probably believed them to be true; but it does not follow that what he stated was correct. In so far as the document may contain admissions, it is evidence against the writer; but in so far as it states facts in his favour it is not evidence for him, unless it has been received and accepted by the other side. "A person cannot, by a declaration, make evidence to be used for himself or for his successors after his decease" (*b*).

Nevertheless there are certain documents which are received as evidence of the facts stated in them, by whichever party they are put in. Ancient documents, if produced from a proper custody, are evidence of the facts which they record (*c*); and extracts from State records (*d*), public registers (*e*), bankers' books (*f*), etc., are also evidence not

(*b*) *Per* JOYCE, J., in *Brocklebank* v. *Thompson*, [1903] 2 Ch. at p. 352.
(*c*) See *post*, p. 243.
(*d*) See *post*, p. 213.
(*e*) See *post*, p. 226.
(*f*) See *post*, p. 320.

merely of the language of the original documents from which they are extracted, but also that the statements made in those original documents are true.

On the other hand, the memory of man is often treacherous; while a document records details in a permanent form. Hence, although a witness should always state what he himself remembers and not what he has been told by others, he may nevertheless, when giving evidence, refresh his memory as to details by referring to documents made by himself or another by his orders at or very shortly after the date on which the event in question occurred. Such documents, if written by someone else, must have been read and approved by him shortly after the event. It does not matter that the document is not, in itself, evidence for either party, or even that it should be and is not stamped (*g*). But the counsel on the other side is entitled to look at any document by which the witness has refreshed his memory and to cross-examine him on it, but if he does so he makes it evidence against the party whom he represents. The witness should not read aloud the entry by which he refreshes his memory; it is indeed a general rule that a witness must not read his answer to any question.

A witness may refresh his memory by looking at any memorandum—

(1) Which revives in his mind a recollection of the fact to which it refers;

(*g*) *Maugham* v. *Hubbard*, 8 B. & C. 14; *Birchall* v. *Bullough*, [1896] 1 Q. B. 325.

(2) Which, although it fails to revive such a recollection, creates a knowledge or belief in the witness that, at the time when the memorandum was made, he knew or believed it to contain an accurate statement of such facts;

(3) Which, although it revives neither a recollection of the facts, nor of a former conviction of its accuracy, satisfies the witness that the memorandum would not have been made unless the facts which it reports had actually occurred (*h*). This is an extreme case, for it allows a witness to depose to facts of which he even now has no recollection (*i*).

It is not necessary that the memorandum should have been actually made by the witness, if he can otherwise make it an original source of personal recollection. Thus, a witness has been allowed to refresh his memory from a paper which he remembers having recognised as a correct narrative when the facts were fresh in his memory (*k*).

In this way, a writing, which is inadmissible for want of a stamp, may practically be made evidence, as a memorandum to prompt the oral statement of a witness (*l*). Thus, a writing which is void as an agreement may be equally serviceable as a memorandum; again, a memorandum of the receipt of money, which was void as a receipt for want of a stamp, has been held strictly admissible to refresh the memory of a witness, and to enable him to say, from the fact of his signature, that he had received money which he had no recollection of having received (*m*).

The opposite party is entitled to see any memorandum by which a witness refreshes his memory, and to cross-examine him upon it (*n*). He may cross-examine upon

(*h*) *Dupuy* v. *Truman*, 2 Y. & C. Ch. 341.
(*i*) *R.* v. *St. Martin's, Leicester*, 2 A. & E. 210.
(*k*) *Duchess of Kingston's Case*, 20 How. St. Tr. at p. 619; *Burrough* v. *Martin*, 2 Camp. 112; Cockle, 268.
(*l*) *Birchall* v. *Bullough*, [1896] 1 Q. B. 325.
(*m*) *Maugham* v. *Hubbard*, 8 B. & C. 14; Cockle, 266.
(*n*) *R.* v. *Hardy*, 24 How. St. Tr. at p. 824.

such part of the memorandum as is referred to by the witness, without making the memorandum part of his evidence; but if he cross-examines upon other parts, he makes them portions of his own evidence (*o*). Where a document is put into a witness's hand, but nothing is done upon it, the opposite party is not entitled to see it (*p*); and where a diary was used by a witness to refresh his memory, it was held that the opposite party was only entitled to see such portions as referred to the subject-matter of the suit (*q*). Where the witness derives his knowledge of a fact *solely* from his reliance on the accuracy of the memorandum, it must be produced (*r*).

There is no precise time within which a writing must be shown to have been made, before it can be used by a witness. It is not necessary that it should have been made at the moment when the fact occurred, but it ought to have been made soon afterwards, or at least within such a subsequent time as will support a reasonable probability that the memory of the witness had not become impaired when the statement was committed to paper. It appears to be only necessary that the witness should swear positively that the memorandum was made at a time when he had a distinct recollection of the facts (*s*).

The memorandum must either have been made by the witness, or recognised by him as a correct account at or shortly after the time when it was made. It must be the genuine memorandum of the witness, not one prepared by the solicitor for the purposes of the trial (*t*). It must not contain any of the elements of hearsay, and it will therefore be inadmissible if it appears to be the statement of a third person (*u*), as where it had been drawn

(*o*) *Per* Gurney, B., in *Gregory* v. *Tavernor*, 6 C. & P. at p. 281.
(*p*) *Sinclair* v. *Stevenson*, 1 C. &. P. 585.
(*q*) *Burgess* v. *Bennett*, 20 W. R. 720.
(*r*) *Doe* v. *Perkins*, 3 T. R. at p. 754.
(*s*) *Burrough* v. *Martin*, 2 Camp. 112; Cockle, 268.
(*t*) *Steinkeller* v. *Newton*, 9 C. & P. 315; *Anon.*, cited in *Doe* v. *Perkins*, 3 T. R. pp. 752—4.
(*u*) *Anon.*, Ambler, 252.

up afterwards by such a person from the witness's own memoranda; or even if it is a copy made by the witness himself from his own original memoranda (*x*). "The copy of an entry, not made by the witness contemporaneously, does not seem to be admissible for the purpose of refreshing a witness's memory" (*y*). But the author of a written report (*z*), or of an article in a newspaper (*a*), has been allowed to refer to the printed versions of what he wrote.

The obvious fact that a writing is the best record of a transaction has caused several statutes to be passed, and is the reason also for some rules of the common law, which require that certain grants, assignments and agreements must be proved by a writing. In many cases, too, the law requires the further solemnity of a seal; in a few cases it goes further, and requires that the execution of the deed or other instrument should be witnessed by one or more third persons, who sign their names as guaranteeing the authenticity of the document. Thus wills, grants of land, leases and assignments of leases have been required by various statutes to be in writing; so have transfers of shares and other assignments of personalty such as ships and copyrights. Any acknowledgment which prevents the period of limitation running against a person who is entitled to any freehold interest in land must be in writing signed by the person in whose favour time is running, and given to the former person or his agent (*b*).

(*x*) *Jones* v. *Stroud*, 2 C. & P. 196.
(*y*) *Per* PATTESON, J., in *Burton* v. *Plummer*, 2 A. & E. at p. 343.
(*z*) *Horne* v. *Mackenzie*, 6 Cl. & F. 628.
(*a*) *Topham* v. *M'Gregor*, 1 Car. & K. 320.
(*b*) *Beamish* v. *Whitney*, [1909] 1 Ir. R. 360.

Again, it was a clear rule of the common law that contracts by corporations must be made under the seal of the corporation or by a person authorised under seal or must be ratified by seal (*c*); for the seal is the only authentic evidence of what the corporation has done or agreed to do (*d*).

A number of exceptions have been engrafted on this rule, and the result is that minor contracts, or those of daily necessary occurrence (*e*), may be proved without being under the seal of the corporation (*f*). And whenever the transaction is incidental to the objects and daily business of the corporation, such as the repair of its premises (*g*), or purchases of goods for its ordinary and regular purposes (*h*), it does not require to be proved by a formal contract under seal. But when the contract is of such a magnitude, or of such an unusual description, as to require reasonably the formal and express assent of the corporation, the fact must be proved by a writing under seal (*i*).

It is now clear law that a corporation will be bound by a contract not under seal of which it has received the benefit (*k*) except, of course, where any statute intervenes. Local authorities, for instance, whether actual corporations or not, are bound by statute (*l*) to make their contracts in prescribed forms.

When an individual, as distinct from a corporation, makes a contract which falls within the provisions of the Statute of Frauds or of Lord Tenterden's Act, he cannot enforce it unless it is evidenced by a writing. In an

(*c*) *Arnold* v. *Mayor of Poole*, 4 M. & G. 860; *Mayor of Oxford* v. *Crow*, [1893] 3 Ch. 535.
(*d*) *Mayor of Ludlow* v. *Charlton*, 6 M. & W. 815.
(*e*) *Nicholson* v. *Bradfield Union*, L. R. 1 Q. B. 620.
(*f*) *Church* v. *Imperial Gas Light and Coke Co.*, 6 A. & E. 861.
(*g*) *Sanders* v. *St. Neots Union*, 8 Q. B. 810.
(*h*) *South of Ireland Colliery Co.* v. *Waddle*, L. R. 4 C. P. 617.
(*i*) *Homersham* v. *Wolverhampton Rail. Co.*, 6 Ex. 137.
(*k*) *Melbourne Banking Corporation* v. *Brougham*, 7 App. Cas. 307.
(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174.

action of tort—namely, in an action of deceit founded on a representation as to a third person's character or position —a written document is necessary.

Lastly, the Statutes of Limitations can be prevented from running and even the statute-barred debt revived by the debtor (or, in many cases, his agent) giving a signed acknowledgment in writing to the creditor or his agent (*m*).

Another and a most important rule of evidence is also based upon the fact that the best method of preserving a clear recollection of the details of any transaction is to set them down in writing. It is for this reason that whenever the parties to any contract or grant or other disposition of property have set out its terms and conditions in a writing, which they presumably intend to be a record of the transaction, the law forbids any attempt to establish any other terms by means of oral evidence. Hence it is a clear rule of law that whenever a document purports to be the record of the final intention and agreement of two parties, who have entered into any contract or made any grant or transfer of property, no parol evidence is admissible to contradict or vary its terms (*n*).

But parol evidence is admissible to show that there never was any such contract, grant, or transfer at all, or that it never was reduced into writing, or that this is not *the* writing to which it was reduced. In short, any evidence is admissible the effect of which is to wipe out the transaction altogether; *e.g.*, by showing a want of capacity in either

(*m*) *Cooper* v. *Kendall*, [1909] 1 K. B. 405; *Read* v. *Price*, [1909] 2 K. B. 724.

(*n*) *Hitchings & Coulthurst Co.* v. *Northern Leather Co. of America*, [1914] 3 K. B. 907.

party, fraud, mutual mistake, illegality, or the non-fulfilment of a condition precedent (*o*). So, parol evidence is admissible to prove that the contract was induced by a misrepresentation (fraudulent or innocent), or that there was a collateral warranty (*p*).

Parol evidence is also admissible to annex to the contract certain customary incidents which the parties had in their minds and took as a matter of course, and therefore did not take the trouble to set down in writing, provided such alleged customary incidents are not inconsistent with the written terms (*q*). Such a custom must be general within the trade or market (*r*), but it need not be ancient (*s*). Again, parol evidence is always admissible to prove that the contract was *rescinded* by a subsequent contract, and also, unless the contract be one which is required by statute to be in writing, to prove that this contract was *varied* by a subsequent contract (*t*). Lastly, parol evidence is admissible to prove that the instrument is wrongly dated, or to fix the date of an undated instrument (*u*).

The rule laid down above applies equally whether the grant or contract in question be required by

(*o*) *Pym* v. *Campbell*, 6 E. & B. 370; *Wake* v. *Harrop*, 31 L. J. Ex. 451; *Pattle* v. *Hornibrook*, [1897] 1 Ch. 25.

(*p*) *De Lassalle* v. *Guildford*, [1901] 2 K. B. 215.

(*q*) *Wigglesworth* v. *Dallison*, 1 Smith, L. C., 613; *Hudson* v. *Clementson*, 18 C. B. 213.

(*r*) *Nelson* v. *Dahl*, 12 Ch. D. at p. 576; *Willans* v. *Ayers*, 3 App. Cas. at p. 145.

(*s*) *Goodwin* v. *Robarts*, L. R. 10 Ex. at p. 351; *Edelstein* v. *Schuler & Co.*, [1902] 2 K. B. 144.

(*t*) *Goss* v. *Lord Nugent*, 5 B. & Ad. 64; *Vezey* v. *Rashleigh*, [1904] 1 Ch. 634; *Morris* v. *Baron & Co.*, [1918] A. C. 1.

(*u*) *Davis* v. *Jones*, 17 C. B. 625.

law to be in writing or not. It is a rule of the common law, wholly independent of any statute. It is also wholly independent of the rules which regulate the admissibility of secondary evidence. It is true that, when an original grant or contract is lost or has been destroyed, secondary evidence of its contents becomes admissible. But such evidence can only be directed to determining with as much precision as possible the terms of the missing document. It will not be allowed to add to or vary those terms.

It is a rule of law, then, that parol evidence is inadmissible to contradict, add to, subtract from, or vary the terms of a written instrument. Where a contract is required by the law to be in writing or has been voluntarily put into writing by the parties, all controversy as to its purport and effect ought clearly to be determined by the inspection of the written instrument, and therefore the written contract must, as a general rule, be produced, and though oral evidence may be given to destroy or explain such a written contract, it cannot be given to vary it, except when relief is sought in equity on the ground of mistake or surprise (*x*).

Neither party can show that, before the contract was reduced to writing, the parties agreed to a term which does not appear in the writing, and which is clearly repugnant to its provisions; for all such antecedent oral terms are merged in the express language of the writing. Thus, where a lease provided that the lessee would pay the rent in advance, it was held that an antecedent parol agreement that he would give bills at three months for the rent in advance was inconsistent with the provision in the lease, and that evidence thereof was inadmissible (*y*).

(*x*) *Price* v. *Ley*, 32 L. J. Ch. 530.
(*y*) *Henderson* v. *Arthur*, [1907] 1 K. B. 10; and see *Emmet* v. *Dewhirst*, 21 L. J. Ch. 497.

A policy of insurance cannot be contradicted by an antecedent written agreement, as where a defendant attempts to show, by such an agreement, that the risk was to begin at a place and date subsequent to those which are named in the policy; nor can a charter-party be varied by a parol agreement substituting one place of destination for another (*z*), unless such an agreement can be treated, not as a new term, but as a new and distinct contract (*a*); nor can a release be varied by evidence of verbal negotiations prior to such release (*b*).

A written contract to supply flour of XS. quality cannot be varied by parol evidence to show that by XS. quality the parties intended XSS. quality (*c*). So, a written contract to supply foreign refined oil cannot be varied by oral evidence that the parties agreed to consider an inferior kind of oil a foreign refined oil (*d*); and a policy of insurance cannot be varied by evidence of oral or written declarations which were made to the insurer, but not embodied in the policy (*e*). The valuation of a ship in a valued policy is, in the absence of fraud or wagering, conclusive between the parties for the purposes of the contract (*f*).

When an instrument contains an ambiguity, evidence of user under it may be given in order to show the sense in which the parties used the language employed. This rule applies to a modern as well as to an ancient instrument, and where the ambiguity is patent as well as where it is latent. Where, therefore, in a land certificate issued by the Crown in 1899 there is a variance between the stated acreage and the area as described by physical boundaries (namely, one mile along a river to a width of a

(*z*) *Leslie* v. *De la Torre*, cited in *White* v. *Parkin*, 12 East, 583.
(*a*) *White* v. *Parkin*, *supra*.
(*b*) *Mercantile Bank of Sydney* v. *Taylor*, [1893] A. C. 317.
(*c*) *Harnor* v. *Groves*, 15 C. B. 667.
(*d*) *Nichol* v. *Godts*, 10 Ex. 191.
(*e*) *Halhead* v. *Young*, 6 E. & B. 312.
(*f*) *North of England Ship Insurance Co.* v. *Armstrong*, L. R. 5 Q. B 244.

quarter of a mile therefrom), evidence can be given of user inconsistent with the area intended being that included in the boundaries, so as to establish that that description is a *falsa demonstratio* (*g*). But where the words of an instrument, when taken by themselves, are quite clear, parol evidence will not be admitted to create an ambiguity. Thus, where a deed conveys Blackacre, as specified in a schedule and map annexed, parol evidence will not be received to show that Whiteacre, which is not mentioned in the schedule or map, has always been part of Blackacre (*h*). So, when several classes of goods, of superior and inferior quality, are comprised under one generic name, and a written contract is made to supply goods of that name, the contract will be fulfilled by a supply of any goods to which that name is applicable; and parol evidence will not be received to show that the parties intended that goods of the superior quality should be supplied (*i*).

A person, who appears on the face of a written contract to have contracted as a principal, cannot, in order to avoid liability, show by extrinsic evidence that he contracted as an agent (*k*); nor can he show that a contract, signed by him expressly as a principal, was made by him as an agent for the party to the action (*l*). But the description in a charterparty of one of the contracting parties as "charterer" does not, of itself, designate him as the only person to fill that position. Where, therefore, an action for breach of charterparty was brought by persons claiming to be the undisclosed principals of a party described in the contract as "charterer," and objection was taken to the admission of evidence that the plaintiffs were in fact the charterers, on the ground that such

(*g*) *Watcham* v. *A. G. of East Africa Protectorate*, [1919] A. C. 533; and see *Auerbach* v. *Nelson*, [1919] 2 Ch. 383.
(*h*) *Barton* v. *Dawes*, 10 C. B. 261.
(*i*) *Smith* v. *Jeffryes*, 15 M. & W. 561.
(*k*) *Higgins* v. *Senior*, 8 M. & W. 834; but see *Chapman* v. *Smethurst*, [1909] 1 K. B. 927.
(*l*) *Humble* v. *Hunter*, 12 Q. B. 310; *Formby Brothers* v. *E. Formby*, [1910] W. N. 48; 102 L. T. 116.

evidence would contradict the written contract, it was held that the evidence was admissible (*m*). If the contract appears to have been made merely in his own name, without addition, it may be shown that he was in fact an agent for another in order to make such other liable (*n*), as this does not contradict the contract, nor does it make any difference if the name of the principal is disclosed at the time the contract is made (*o*). And where a business had been carried on by the widow and sons of a deceased trader under his name, and that name had been signed to a deed executed after the death, parol evidence was received by the Court to show that the name was signed as meaning the firm as it existed at that time (*p*).

Extrinsic evidence is inadmissible to show that a person, not on the face of it a party to a written instrument, was, in fact, a party (*q*); but where a defendant had signed an agreement under seal as agent for a firm, whereby the firm agreed to make certain payments to the plaintiffs, which agreement contained a clause to the effect that the defendant guaranteed such payments, although the defendant was not named as a party to the agreement, extrinsic evidence was held admissible by the Court of Appeal to prove that the defendant intended to sign on his own behalf as well as for his principals so as to make him liable as a guarantor (*r*). It may, however, be observed that this decision does not establish any such principle as that the capacity in which a man signs a document is always provable by extrinsic evidence.

On the other hand, parol evidence is admissible to prove that that which purports to be a deed or writing of a certain kind has been made under circumstances which deprive it of all such effect. Thus it may be

(*m*) *Drughorn, Ltd.* v. *Rederiaktiebolaget Transatlantic*, [1919] A. C. 203.
(*n*) *Per* PATTESON, J., in *Humble* v. *Hunter*, *supra*.
(*o*) *Calder* v. *Dobell*, L. R. 6 C. P. 486.
(*p*) *Wray* v. *Wray*, [1905] 2 Ch. 349.
(*q*) *Robinson* v. *Rudkins*, 26 L. J. Ex. 56.
(*r*) *Young* v. *Schuler*, 11 Q. B. D. 651.

shown that a written instrument purporting to be a contract between the parties was not so intended (*s*), or that it was made subject to a condition through the non-fulfilment of which no contract has ever arisen (*t*); and on the same principle Lord PENZANCE held that it might be shown that a duly executed codicil was not intended by the testator to be operative (*u*). So it may be shown that an instrument, which purports to be a binding one to take effect immediately, was delivered as an escrow, and was not intended to operate until certain things were done (*x*). Parol evidence is admissible to show that, after signing a document, the defendant assented to certain alterations made by the plaintiff before it was signed by the latter, for such evidence does not vary the contract, but only proves the condition of the document when it first became a contract (*y*). Wherever it is attempted to superadd an oral to a written contract, there must be clear evidence of the actual words used (*z*).

There is more difficulty in adding by parol evidence a new term to a written contract, when that contract is required to be in writing by the Statute of Frauds or some other statute, or by any rule of the Common Law (*a*); and for this reason—the result of thus adding a new term will be that the contract between the parties becomes partly in writing and partly by word of mouth, and it therefore is *ex hypothesi* void. But a written contract may be wholly rescinded by parol, whether it is such as is required by law to be in writing or not (*b*).

(*s*) *Clever* v. *Kirkman*, 24 W. R. 159.

(*t*) *Pym* v. *Campbell*, 6 E. & B. 370; Cockle, 348; followed in *Pattle* v. *Hornibrook*, [1897] 1 Ch. 25.

(*u*) *Lister* v. *Smith*, 3 Sw. & Tr. 282.

(*x*) *Gudgen* v. *Besset*, 6 E. & B. 986; *Davis* v. *Jones*, 17 C. B. 625; cf. *Pattle* v. *Hornibrook*, *supra*.

(*y*) *Stewart* v. *Eddowes*, L. R. 9 C. P. 311.

(*z*) *Per* JAMES, L.J., in *Thomson* v. *Simpson*, 18 W. R. 1091.

(*a*) For the examples see *ante*, pp. 158 *et seq.*

(*b*) But note that, by the Wills Act, 1837, s. 21, an instrument revoking a will must be executed in the same manner as a will. It is submitted that the old rule that a deed cannot be revoked except by deed is now obsolete.

This is so both in law and in equity. The important question is therefore, What was the intention of the parties? Did they intend to rescind or only to vary the original agreement (*c*)?

As LINDLEY, J., said in *Hickman* v. *Haynes* (*d*):—

> "Neither a plaintiff nor a defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing, and required so to be by the Statute of Frauds."

And this is of course equally true of all attempted variations (*e*). A parol variation of a written contract may, however, be set up as a defence to an action for specific performance of the contract; and it depends on the particular circumstances in each case whether the variation is to defeat the plaintiff's title to have specific performance, or whether the Court will decree performance of the contract, taking care that the subject-matter of the parol agreement or understanding is carried into effect, so that all parties may have the benefit for which they contracted (*f*).

An agreement to waive or rescind may be deduced from conduct (*g*), as well as from words; but there must be clear evidence of the alleged agreement; and therefore Lord ST. LEONARDS refused to hold a loose conversation by a tenant, in which he stated his interest to be different from that which he claimed under a contract for a lease, to amount to an abandonment of the contract (*h*).

But where the parties have *voluntarily* put their contract into writing, without being required to do so by law, it is competent to them at any time before breach of it, by a new contract not in writing, either to rescind the written contract altogether, or to add to, or vary its

(*c*) *Vezey* v. *Rashleigh*, [1904] 1 Ch. 634; cf. *Noble* v. *Ward*, L. R. 2 Ex. 135; and *Morris* v. *Baron & Co.*, [1918] A. C. 1.
(*d*) L. R. 10 C. P. at p. 605; cf. *Noble* v. *Ward*, *supra*.
(*e*) See *Emmet* v. *Dewhirst*, 21 L. J. Ch. 497.
(*f*) See *Smith* v. *Wheatcroft*, 9 Ch. D. 223; and Fry on Specific Performance, 5th ed., 381, 382.
(*g*) *Carter* v. *Dean of Ely*, 7 Sim. 211.
(*h*) *Moore* v. *Crofton*, 3 Jo. & Lat. 438.

terms, and thus to make a new contract, which is to be proved partly by the written contract, and partly by the subsequent verbal terms engrafted upon what is left of the written agreement (*i*).

The doctrines of Equity in rectifying mistakes in deeds, so as to make them accord with the real agreement between the parties, may be regarded as a further exception to the general rule under consideration. But where a deed was executed in conformity with a previous written agreement, the Court refused to receive evidence of the alleged intention of the parties, inconsistent with the written agreement and deed, for the purpose of rectification (*k*). Thus a conveyance of land was recently rectified where the Court was satisfied that there was a mistake common to both parties, which the vendor had only recently discovered, although six years had elapsed since the conveyance (*l*).

Evidence is admissible to show that immediately before the written agreement was signed a distinct oral arrangement was made, adding to, but not inconsistent with, the former (*m*); and whether the oral agreement precede or be contemporaneous with the written agreement is of no consequence, provided it be on a distinct collateral matter, although it is part of the same transaction. Thus a consignor of goods may prove any additional contract to carry which does not contradict or vary the written one (*n*). So, too, a tenant may prove the existence of a warranty by his landlord as to drains, collateral to the lease (*o*). But in no case can a collateral oral agreement be set up if it contradicts the terms of the written one (*p*). If an oral arrangement was made

(*i*) *Goss* v. *Lord Nugent*, 5 B. & Ad. 58.

(*k*) *Thompson* v. *Hickman*, [1907] 1 Ch. 550; see also *May* v. *Platt*, [1900] 1 Ch. 616; *Davies* v. *Fitton*, 2 D. & War. 225.

(*l*) *Beale* v. *Kyte*, [1907] 1 Ch. 564.

(*m*) *Lindley* v. *Lacey*, 17 C. B. (N.S.) 578; *Frith* v. *Frith*, [1906] A. C. 254; *Jones* v. *Wasley*, 18 T. L. R. 418.

(*n*) *Malpas* v. *London and South Western Rail. Co.*, L. R. 1 C. P. 336.

(*o*) *De Lassalle* v. *Guildford*, [1901] 2 K. B. 215.

(*p*) *New London Credit Syndicate* v. *Neale*, [1898] 2 Q. B. 487;

as a mere suspension of a written agreement, it will be admissible in evidence (*q*); and on the same principle, when an agreement does not declare the time from which and to which it is to operate, parol evidence is receivable to supply the ambiguity (*r*). If a written agreement has been treated as incomplete, parol evidence of a subsequent further and fuller agreement may be given (*s*).

Where the printed conditions of sale at an auction, signed by the auctioneer, described the time and place of the sale, and the number and kind of timber sold, but said nothing about the weight, evidence of the auctioneer's statements at the sale was held inadmissible to prove that a certain weight had been warranted (*t*). This case is distinguishable from a later case, which decided that unsigned conditions of sale are only in the nature of a personal memorandum, which may be varied at any time before the sale by an express notice to a purchaser (*u*).

Extrinsic evidence is also admissible to annex incidents to a written instrument, where the inclusion of such incidents is consistent with the writing, and carries out the intention of the parties. In such cases the notoriety of the usage makes it probable and reasonable that the parties intended it to be a term of their contract. Thus, where a written contract contained a stipulation that a party should "lose no time on his own account, and do his work well and behave himself in all respects as a good servant," extrinsic evidence was received to show that, by the custom of his trade, such a party was entitled to certain holidays (*x*). In commercial cases

Vezey v. *Rashleigh*, [1904] 1 Ch. 634; *Henderson* v. *Arthur*, [1907] 1 K. B. 10; *Morris* v. *Baron & Co.*, [1918] A. C. 1.

(*q*) *Wallis* v. *Littell*, 11 C. B. (N.S.) 369; *Hitchings & Coulthurst Co.* v. *Northern Leather Co. of America*, [1914] 3 K. B. 907.

(*r*) *Davis* v. *Jones*, 17 C. B. 625.

(*s*) *Johnson* v. *Appleby*, L. R. 9 C. P. 158.

(*t*) *Powell* v. *Edmunds*, 12 East, 6. But note that this case was clearly within the Statute of Frauds.

(*u*) *Eden* v. *Blake*, 13 M. & W. 614.

(*x*) *R.* v. *Stoke-upon-Trent*, 5 Q. B. 303.

and in other transactions of life where customs and usages are known to prevail, extrinsic evidence of such custom or usage is admissible to annex incidents to written contracts in matters with respect to which they are silent; "and this has been done upon the principle of presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages" (*y*). Such evidence, however, will not be admitted where it is repugnant to, or inconsistent with, the words of the written contract (*z*). Thus, where the defendants buy as brokers for a principal, whose name they do not disclose at the time of contract, evidence of a custom will be admitted to show that in this case the broker is personally liable on the contract (*a*). And in the well-known case of *Wigglesworth* v. *Dallison* (*b*) it was held by Lord MANSFIELD, C.J., and the Court of King's Bench that a custom that the tenant, whether by parol or by deed, shall have the away-going crop, after the expiration of his term, is good, if not repugnant to the lease by which he holds. Moreover, whenever the contract is in writing and a custom has been proved in accordance with the rule in *Wigglesworth* v. *Dallison*, evidence is not admissible of a parol agreement to exclude the custom (*c*).

Again, parol evidence is always admissible to show that a written contract, whether under seal or not, never existed legally; or that it was formed under circumstances which rendered it void *ab initio*. Thus, a defendant in an action on a written contract, may plead that it was void, as being made under circumstances of fraud, duress, or for illegal consideration;

(*y*) *Per* PARKE, B., in *Hutton* v. *Warren*, 1 M. & W. 475.
(*z*) *Browne* v. *Byrne*, 3 E. & B. 703; *Cuthbert* v. *Cumming*, 11 Ex. 405; *Burges* v. *Wickham*, 3 B. & S. 669; cf. *Phillipps* v. *Briard*, 1 H. & N. 21.
(*a*) *Humfrey* v. *Dale*, 7 E. & B. 266.
(*b*) 1 Doug. 201; 1 Sm. L. C. 613.
(*c*) 1 Sm. L. C. 613; *Fawkes* v. *Lamb*, 31 L. J. Q. B. 98.

and he may prove such a plea by any species of parol evidence (*d*). He may also show that a bill or promissory note, on which he is *primâ facie* liable, was obtained from him without consideration, for the purpose of being discounted; or he may show any other similar failure of consideration; but he may not give parol evidence, which goes merely to limit his liability (*e*). As a general rule, upon all written contracts not under seal extrinsic evidence will be admissible to support a plea of failure or want of consideration. When the contract is under seal it is not necessary to prove a consideration, but either party may, by extrinsic evidence, show that there was consideration, even though none is mentioned in the deed, or that there was another consideration beyond that named in the deed (*f*). Thus, a deed purporting to be founded on a pecuniary consideration may be proved to have been founded also on any other valuable consideration, such as marriage (*g*). So where the deed purports to be founded on natural affection, it may be shown to have been founded also on a valuable consideration; this may be most material on a charge of fraud or undue influence (*h*). In such cases the extrinsic evidence is received only to annex an incident which is not clearly excluded by, or inconsistent with, the written instrument (*i*).

Any fact which is not of the essence of the contract can be proved by parol testimony. Thus, a deed may be proved to have been delivered either before or after the day on which it purports to have been delivered (*k*), and

(*d*) *Collins* v. *Blantern*, 1 Sm. L. C. 412; *Robinson* v. *Lord Vernon*, 7 C. B. (N.S.) 231.

(*e*) *Abrey* v. *Crux*, L. R. 5 C. P. 37; see also *Stott* v. *Fairlamb*, 53 L. J. Q. B. 47.

(*f*) *R.* v. *Scammonden*, 3 T. R. 474; see also *Townend* v. *Toker*, L. R. 1 Ch. 446; *Frith* v. *Frith*, [1906] A. C. 254.

(*g*) *Villen* v. *Beaumont*, 2 Dyer, 146 a.

(*h*) *Gale* v. *Williamson*, 8 M. & W. 405.

(*i*) *R.* v. *Inhabitants of London*, 8 T. R. 379; and see *per* WILLIAMS, J., in *R.* v. *Stoke-upon-Trent*, 5 Q. B. at p. 308.

(*k*) *Goddard's Case*, 2 Rep. 4 b; and see *Doe* v. *Robson*, 15 East, 32, *post*, p. 266.

parol evidence is admissible to show that there was a mistake in the date of a charter-party (*l*), a deed (*m*), or a will (*n*); but the day appointed in a written contract for the performance of a certain act, such as the completion of a purchase, cannot be altered by extrinsic evidence (*o*). Parol evidence is admissible to prove that, owing to a subsequent agreement extending the time for payment, there has been no default within the meaning of a mortgage deed (*p*).

Where a contract for the sale of goods specified no time for removing them, it was held that oral evidence could not be given of a condition that they should be removed immediately, because to admit the evidence would be to vary the contract (*q*).

But it does not follow from the foregoing statements that whenever a narrative of some event exists in writing, the fact cannot be proved by parol. Thus a marriage may be proved by any one present, although an entry was made in a register. So the fact that A. acted in a certain capacity (*e.g.*, as judge, sheriff, or constable), is sufficient proof, although his appointment was in writing (*r*).

Again, a written receipt is *primâ facie* evidence of payment; but it is not the only evidence. The payment may, therefore, be proved either by producing the creditor's receipt and proving his signature, or by the oral testimony of the debtor. And the fact that a debtor has given a written promise to pay does not prevent the creditor

(*l*) *Hall* v. *Cazenove*, 4 East, 477.
(*m*) *Payne* v. *Hughes*, 10 Ex. 430.
(*n*) *Reffell* v. *Reffell*, L. R. 1 P. & D. 139.
(*o*) *Stowell* v. *Robinson*, 3 Bing. N. C. 928.
(*p*) *Albert* v. *Grosvenor Investment Co.*, L. R. 3 Q. B. 123.
(*q*) *Greaves* v. *Ashlin*, 3 Camp. 426.
(*r*) *R.* v. *Gordon*, 1 Leach, C. C. 515. Cf. *Peacock* v. *Harris*, 10 East, 104; *Dickinson* v. *Coward*, 1 B. & Ald. 677; *Collins* v. *Carnegie*, 1 A. & E. 695.

proving that the debtor orally admitted that he owed the money (*s*). Even if there be a written agreement of tenancy, the fact that there is such a tenancy can be proved by parol evidence. But if it be desired to prove who are the parties, what is the rent to be paid and what are the terms of the tenancy, the written document itself must be produced (*t*).

In an action for infringement of copyright a witness was allowed to state that the infringing photograph was a pirated copy of an original picture painted by Mr. Marcus Stone, which was then in Australia. It was held unnecessary to produce the original picture to establish that the alleged copy was an infringement (*u*); for as Lord Esher, M.R., remarked in the Court of Appeal: "Different kinds of evidence may be used to prove the same fact."

(*s*) *Singleton* v. *Barrett*, 2 C. & J. 368.
(*t*) *R.* v. *Kingston-upon-Hull*, 7 B. & C. 611.
(*u*) *Lucas* v. *Williams & Sons*, [1892] 2 Q. B. 113.

CHAPTER IV.

WITNESSES.

COMPETENCY: OATH AND AFFIRMATION.

Every sane adult person is a competent witness in both civil and criminal cases. Even a child who does not understand the nature of an oath can now give evidence unsworn in all criminal cases; but such evidence must be corroborated. In all criminal cases the husband or wife of the accused is a competent witness; but can only give evidence with the consent of the accused, except in a few special cases (*a*).

Every person competent to give evidence can, generally, be compelled by the Court to give evidence in civil, but not always in criminal (*b*), proceedings. A person in this position is described as a "competent and compellable witness."

Any objection to the competency of a witness must be decided by the judge. If there is any doubt on the matter the judge will examine into the competency of the witness tendered before allowing him to be sworn; he will if necessary hear witnesses for this purpose (*c*).

In no branch of our law, perhaps, have more important

(*a*) See *post*, p. 181.
(*b*) Cf. *post*, pp. 182, 183.
(*c*) This was called the examination on the *voir dire*, *i.e.*, *vrai dire*.

or more beneficial changes been made than in this portion of the law of evidence. A hundred years ago the mouths of all persons who knew most about the matters in dispute in any legal proceeding were closed. No one could give any evidence if he or she had the slightest interest in the result of the litigation.

In any civil action neither the plaintiff nor the defendant could be heard (*d*). If there were several plaintiffs or defendants, the evidence of them all was excluded; so was the evidence of their respective husbands and wives. It was supposed that they might commit perjury, because they had some remote interest in the damages or the property sought to be recovered in the action. If a man insured his life, and died, and the insurance company resisted the claim made by his executors on the ground that the deceased had shortened his life by habitual intemperance, no member of his family could give evidence as to the real habits of the deceased, unless he or she was excluded from all benefit in his estate. The same rule prevailed in criminal proceedings. Neither the accused nor the wife or husband of the accused could give any evidence. If two or more prisoners were being tried together on a joint indictment, none of the prisoners or their wives or husbands could give evidence against or in favour of any one of them, nor could any person who would be pecuniarily benefited by the prisoner's conviction. Thus a merchant whose name had been forged to a bill of exchange could not go into the witness-box at the trial of the forger and swear that he never signed the document; he had to sit by in silence while his acquaintances, who had no interest in the result of the proceedings, were called to offer their conjectures as to the handwriting (*e*). As COCKBURN, C.J., said:—

(*d*) In the Court of Chancery, it is true, the plaintiff after filing a bill could administer interrogatories to the defendant and compel him to answer them on oath; but he could not cross-examine the defendant on his answer or call him as a witness at the trial: see "A Century of Law Reform," pp. 181—187.

(*e*) This absurdity in the special case of forgery was removed by a statute of 1828.

"People were formerly frightened out of their wits about admitting evidence, lest juries should go wrong. In modern times we admit the evidence, and discuss its weight" (*f*).

Moreover, in those days no witness might give evidence unless he first took an oath in such form as would bind his conscience. But there were many most scrupulous and veracious persons who, taking too literally the admonition, "But I say unto you, Swear not at all," refused on conscientious grounds to take an oath, even at the bidding of an officer of the State. There were others who had no religious belief, and to whom therefore an oath was meaningless. Both classes of persons were excluded from the witness-box, though they were ready and willing to state the truth, the whole truth, and nothing but the truth. And not content with excluding witnesses on the ground of *interest* and of their religious opinions or the absence of them, our Courts, following the Roman law, excluded the evidence of all "infamous" persons, or those who had been convicted of treason, felony, or certain misdemeanours.

But anyone who objects on conscientious grounds to take an oath is now permitted to make a solemn affirmation that he will speak the truth; and it is no longer an objection to the competency of a witness that he is of infamous character, or that he is a party to the proceedings, or in any other way interested in the result.

It is necessary to state briefly how these important changes were effected.

It was only when the nineteenth century was well advanced that the Legislature began to recognise that the inquiry after truth in courts of justice was often, and needlessly, obstructed by the rules of evidence then in force. The first inroad on the old law took place in 1833, when an attempt was made "to render the rejection of witnesses on the ground of interest less frequent" (*g*).

(*f*) *R.* v. *Overseers of Birmingham*, 1 B. & S. 767.

(*g*) 3 & 4 Will. IV. c. 42, ss. 26, 27. These sections were repealed in 1874 by the Statute Law Revision Act (1), 37 & 38 Vict. c. 35.

Then came Lord Denman's Act (*h*), which enacted that no person offered as a witness should thereafter be excluded from giving evidence by reason of incapacity arising from crime or interest. But this Act left the actual parties on the record and their husbands and wives incompetent witnesses. When, however, the new County Courts were created in 1846, the parties were allowed to give evidence in all cases in these Courts (*i*). Five years later the incompetency of the parties was removed in all courts by the Law of Evidence Amendment Act, 1851 (*k*), which enacts that—

"On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action or other proceeding in any Court of justice, or before any person having by law, or by consent of parties, authority to hear, receive and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable (*l*) to give evidence, either *vivâ voce* or by deposition, according to the practice of the Court, on behalf of either or any of the parties to the said suit, action, or other proceeding" (*m*).

But it was by s. 4 of this Act provided, that nothing therein contained should apply to proceedings instituted in consequence of adultery, or to actions for breach of promise of marriage. The Law of Evidence Further Amendment Act, 1869 (*n*), abolished these two exceptions. After repealing s. 4 of the last-mentioned Act, the Act of 1869 (s. 2) renders the parties to actions for breach of promise of marriage competent witnesses; enacting, at the same time, that the uncorroborated testimony of the plaintiff is not to be sufficient proof of the promise to marry; his or her testimony must be corroborated by some material evidence in support of the alleged

(*h*) 6 & 7 Vict. c. 85.
(*i*) 9 & 10 Vict. c. 95.
(*k*) 14 & 15 Vict. c. 99, s. 2.
(*l*) "Compellable" means "compellable by process of law:" *Kops* v. *The Queen*, [1894] A. C. at p. 652.
(*m*) It will be observed that spouses are not mentioned in this section, but this omission was remedied in an Act passed two years later: the Law of Evidence Further Amendment Act, 1853 (16 & 17 Vict. c. 83).
(*n*) 32 & 33 Vict. c. 68.

promise (*o*). Section 3 of the same Act renders the parties to proceedings instituted in consequence of adultery, and the husbands and wives of such parties, competent witnesses; with the proviso that no witness in any proceeding, whether a party or not, is to be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery (*p*), unless such witness has already given evidence in the same proceeding in disproof of such adultery (*q*). It has now been decided that this section relates only to the adultery charged in the petition (*r*). Hence, the husband and wife are now both competent witnesses in proceedings instituted in consequence of adultery, but they cannot be compelled to answer questions tending to prove their guilt. This matter is dealt with more fully under the head of "Privilege" (*s*).

It was held by two judges of the Common Pleas Division, in *Guardians of Nottingham* v. *Tomkinson* (*t*) in proceedings by the guardians of the union against a husband to compel him to maintain a child of his wife born in wedlock, which he refused to maintain on the ground that he was not its father, that the evidence of the husband was inadmissible to prove non-access to his wife. On the other hand such evidence was admitted in *Re Yearwood's Trusts* (*u*). But in *Re Walker* (*x*), which was an application by an infant for maintenance, resisted on the ground that the infant was illegitimate, KAY, J., and in *Burnaby* v. *Baillie* (*y*), which was an

(*o*) See *post*, Book III., Chap. III.
(*p*) See *S.* v. *S.*, [1907] P. 224.
(*q*) Although these statutes have rendered parties to actions for breach of promise of marriage, and the parties to proceedings taken in consequence of adultery, and their husbands and wives competent witnesses, it is not clear that they are also compellable witnesses. The better opinion is that they are both.
(*r*) *Hall* v. *Hall*, 25 T. L. R. 524.
(*s*) See *post*, p. 199.
(*t*) 4 C. P. D. 343.
(*u*) 5 Ch. D. 545.
(*x*) 34 W. R. 95.
(*y*) 42 Ch. D. 282.

action by a husband, who had been divorced from his wife, for a declaration that there was no legitimate child of the marriage, NORTH, J., followed *Guardians of Nottingham* v. *Tomkinson*. The *ratio decidendi* in both the last cited cases being that the proceedings were not "instituted in consequence of adultery" within the meaning of the Act of 1869. The better opinion however now is that where husband and wife are living together there is a *primâ facie* presumption that access takes place, but this presumption may be rebutted by satisfactory evidence that access did not in fact take place. The non-existence of such access is a physical fact which may be proved in the same way as any other fact (*z*).

Where it is established as a fact that the wife was with child at the date of her marriage the husband can undoubtedly give evidence of non-access before marriage (*a*). So, to rebut the presumption of the legitimacy of a child born during separation, evidence of the conduct of the husband and wife is admissible, and as part of such evidence letters written by the husband or wife are admissible (*b*).

It has long been held that a prosecutor, in a criminal proceeding, is a competent witness against a prisoner; and, although there were formerly exceptions to the rule, they have all been removed by Lord Denman's Act and other statutes. The husband or wife of a prosecutor is a competent witness either for the prosecution or for the defence.

Lord Denman's Act (*c*), by rendering all persons competent as witnesses although they may have an interest in the matter in question, or the event of the trial, removed all doubt as to the admissibility of informers and accomplices as witnesses. All such persons are competent witnesses; but the objections to their credibility remain as before.

(*z*) *Banbury Peerage Case*, 1 S. & S. 155.
(*a*) *Poulett Peerage Case*, [1903] A. C. 395.
(*b*) *Aylesford Peerage Case*, 11 App. Cas. 11.
(*c*) 6 & 7 Vict. c. 85.

At common law, a defendant in a criminal charge, so far from being bound or competent to give evidence against himself, was never bound even to answer the questions put to him upon his examination before a magistrate. Section 3 of the Evidence Amendment Act, 1851 (*d*), confirms this state of the law; and enacts that—

"Nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband."

It is a principle of the common law that no man is bound to criminate himself. But a prisoner, when arraigned, may, if he thinks fit, plead guilty to the charge, and such a formal confession, although not irrevocable (*e*), is, unless revoked, tantamount to a conviction. Again, though a prisoner cannot be compelled (*f*) to make a statement before the magistrates, yet he frequently does so, even after the statutory caution (*g*) has been given, and it is open to the jury to convict him on the admissions made in such a statement. And, as we have seen (*h*), his voluntary statements may also be given in evidence against him.

Many statutes, passed after 1851, enacted that on the trial of the offences created by them, the accused persons and their husbands and wives should be competent witnesses. But their provisions in this respect have been superseded by the Criminal Evidence Act, 1898, with one

(*d*) 14 & 15 Vict. c. 99.
(*e*) *R.* v. *Verney*, 73 J. P. 288.
(*f*) Although a prisoner cannot be compelled to make a statement before the magistrates, yet at the subsequent trial the counsel for the prosecution can comment on the fact that he said nothing and reserved his defence: *R.* v. *McNair*, 25 T. L. R. 228.
(*g*) See *ante*, Book I., Chap. V.
(*h*) *Ibid.*

exception, namely, the first section of the Evidence Act, 1877 (*i*), which still remains law; it is as follows:—

"On the trial of any indictment or other proceeding for the non-repair of any public highway or bridge, or for a nuisance to any public highway, river, or bridge, and of any other indictment or proceeding instituted for the purpose of trying or enforcing a civil right only, every defendant to such indictment or proceeding, and the wife or husband of any such defendant shall be admissible witnesses and compellable to give evidence."

Lastly, in 1898, was passed the Criminal Evidence Act (*k*), which applies to all criminal proceedings (*l*). It makes every person charged with an offence a competent witness "for the defence at every stage of the proceedings;" but he cannot be called except on his own application (*m*). It is the duty of the presiding judge, however, to inform him that he has a right to give evidence if he wishes so to do (*n*). If he elects to go into the witness-box and give evidence on oath, he is liable to be cross-examined and cannot refuse to answer any question on the ground that it would criminate him as to the offence charged, but his cross-examination as to other offences and as to character is governed by the provisions of s. 1 (f) of the Act, which runs as follows:—

"A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged (*o*), or is of bad character, unless—

(i.) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(ii.) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve

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(*i*) 40 & 41 Vict. c. 14.

(*k*) 61 & 62 Vict. c. 36; *Charnock* v. *Merchant*, [1900] 1 Q. B. 474. Consequently the provisions as to cross-examination in the Act of 1898 now govern all criminal proceedings.

(*l*) Proceedings for extradition have been held to be within the Act: *R.* v. *Kams*, Times, April 28th, 1900.

(*m*) Criminal Evidence Act, 1898, s. 6 (1).

(*n*) *R.* v. *Warren*, 25 T. L. R. 623.

(*o*) See *R.* v. *Biggin*, [1920] 1 K. B. 213.

imputations (*p*) on the character of the prosecutor or the witnesses (*q*) for the prosecution; or

(iii.) he has given evidence against any other person charged with the same offence" (*r*).

But note that where the cross-examination addressed to the prisoner tends to show that he is guilty of the offence charged, it cannot be excluded merely on the ground that it also shows that he had previously been guilty of other offences (*s*).

The counsel for the prosecution may comment upon any evidence given under the Act by a person charged (*t*), but he must not comment upon the failure of any such person, or of the wife or husband of such person, to give evidence (*u*). But the judge may comment upon such failure and the Court of Criminal Appeal will not say how far he should go in his comments (*x*). There are, however, many cases in which it would not be expedient or calculated to further the ends of justice so to do (*y*); the matter must be left to the discretion of the judge in the particular case. If he thinks fit to do so, he should also point out to the jury that it is still for the prosecution to make out the case against the prisoner, and that, if it be not made out, the latter's failure to offer himself as a witness cannot legally turn the scale against him.

We have stated that the Act makes the accused person a competent witness "for the defence at every stage of the proceedings." But to this there is one exception. The accused cannot give evidence on oath in mitigation of punishment after he has pleaded guilty (*z*). The prisoner may give evidence on oath at the preliminary

(*p*) See the remarks of Lord ALVERSTONE, reported in 69 J. P. p. 556; and *R.* v. *Westfall*, 107 L. T. 463.

(*q*) *R.* v. *Marshall*, 63 J. P. 36; *R.* v. *Cohen*, [1914] W. N. 160; 111 L. T. 77.

(*r*) *R.* v. *Hadwen*, [1902] 1 K. B. 882; *R.* v. *Wood*, [1920] 2 K. B. 179.

(*s*) *R.* v. *Chitson*, [1909] 2 K. B. 945.

(*t*) *R.* v. *Gardner*, [1899] 1 Q. B. 150.

(*u*) 61 & 62 Vict. c. 36, s. 1 (b).

(*x*) *R.* v. *Rhodes*, [1899] 1 Q. B. 77; *R.* v. *Smith*, [1915] W. N. 309; 84 L. J. K. B. 2153.

(*y*) *Kops* v. *The Queen*, [1894] A. C. 653.

(*z*) *R.* v. *Hodgkinson*, 64 J. P. 808.

hearing before the magistrates. If he elects to do so, his deposition may be put in against him, even though he refuses to go into the witness-box at his trial (*a*). Nevertheless it has been laid down that, where a prisoner is about to be committed for trial, the justices should impress upon him the advisability of giving evidence in defence—if he intends to set up a defence—at the earliest possible stage, otherwise the value of the evidence in defence is, it is said, much lessened, and he will lose the benefit of the Poor Prisoners' Defence Act, 1903 (*b*).

At the trial, if the person charged is the only witness as to the facts called by the defence, it is provided by s. 2 of the Act that he must give his evidence immediately after the close of the evidence for the prosecution. But if other persons are to be called for the defence to speak, not merely as to the character of the accused, but as to the facts of the case, the person accused may give his evidence with these other witnesses after the opening speech of his counsel if he has one.

Where transactions are proved against a prisoner which are capable of an innocent explanation, and he could have given it, and there is *primâ facie* evidence that he is acting illegally, the jury may draw their own conclusions from the fact that he does not give evidence on his own behalf (*c*). The fact that the prisoner has given evidence does not entitle the prosecution to a general reply (*d*). But if the prisoner calls anyone else—even his own wife—as a witness to the facts of the case, the prosecution will have the last word to the jury.

The proviso, permitting certain questions to be asked the prisoner, if he gives evidence, when the "nature or conduct of the defence" involves an imputation on the prosecutor or his witnesses, has received a judicial interpretation. Thus, where the prisoner, on being cross-examined, was asked if the evidence of the prosecutor was

(*a*) *R.* v. *Bird*, 79 L. T. 359; *R.* v. *Boyle*, 20 T. L. R. 192.
(*b*) 3 Edw. VII. c. 38; see *R.* v. *Humphries*, 67 J. P. 396; and *R.* v. *McNair*, 25 T. L. R. 228.
(*c*) *R.* v. *Corrie*, 68 J. P. 294; and see *R.* v. *Stoddart*, 73 J. P. 348.
(*d*) Criminal Evidence Act, 1898, s. 3.

true and replied, "It is a lie and he is a liar," it was held that the answer was merely an emphatic denial of the charge, and consequently did not entitle the prosecution to cross-examine as to his previous offences and character (*e*). Nor will the prosecution be entitled to do so, if the cross-examination of the witnesses for the prosecution or the evidence given by the prisoner does not amount to "more than developing his defence . . . and seeking to substantiate that defence by means of admissions from" the witnesses for the prosecution (*f*). Thus, if on an indictment for rape the prisoner elects to give evidence, and swears that the prosecutrix consented to the connection, this is not such an imputation on her character as will entitle the prosecution to prove that the prisoner has been previously convicted (*g*). The statement that the prosecutrix consented is a defence to the charge. It is otherwise if he goes out of his way to make an attack upon the prosecutrix founded on matters outside the pith and substance of the charge.

And where a prisoner, in his evidence, alleged that his identification at the police station was not to be relied on, because the persons brought to identify him had been coached by a police officer, who was called as a witness for the prosecution, and ended by asserting, under cross-examination, "It is not an honest case at all; it is a got-up affair," it was held that he ought not to have been cross-examined as to previous convictions (*h*). But where the prisoner, in giving evidence, alleged that the offence was really committed by one of the witnesses for the prosecution, it was held that the prosecution was then entitled to cross-examine the prisoner as to her previous offences and bad character (*i*).

(*e*) *R.* v. *Rouse*, [1904] 1 K. B. 184; *R.* v. *Grout*, 26 T. L. R. 60.

(*f*) *R.* v. *Bridgwater*, [1905] 1 K. B. 131, at p. 134; *R.* v. *Jones*, 26 T. L. R. 59; and see the remarks of Lord ALVERSTONE noted in 69 J. P. p. 556.

(*g*) *R.* v. *Sheean*, 72 J. P. 232.

(*h*) *R.* v. *Preston*, [1909] 1 K. B. 568; and see the remarks of CHANNELL, J., at pp. 575, 577.

(*i*) *R.* v. *Marshall*, 63 J. P. 36.

There is sometimes difficulty in determining what is a criminal, as distinguished from a civil, proceeding. This question arose in *Attorney-General* v. *Radloff* (*k*), which was an information for penalties under the repealed Prevention of Smuggling Act, 1845 (*l*); the defendant offered himself as a witness, and the Court was equally divided as to his competency. Proceedings on the revenue side of the Court of Exchequer (*m*) are not deemed criminal proceedings (*n*). Similar doubts were raised in bastardy cases as to the competency of the putative father to be sworn as a witness on his own behalf; but Erle, J., held him to be competent, on the ground that the proceedings on an affiliation order are of a civil, and not of a criminal, nature (*o*). In *Cattell* v. *Ireson* (*p*) it was held that the defendant could not give evidence as he was charged with a breach of the Game Laws, viz., for using snares for game without having a certificate, which was punishable on summary conviction with fine and imprisonment. The test, according to Lord Campbell, in such cases seems to be to consider whether it is sought to recover a sum of money in the nature of a debt from a person, as in bastardy cases; or to inflict punishment of an exemplary and public nature.

Husbands and Wives.

In civil cases, previously to the Evidence Amendment Act, 1853 (*q*), husbands and wives were not competent to give evidence for or against each other (*r*). But that Act rendered husbands and wives competent and compellable, in all *civil* cases, to give evidence "on behalf of any or either of the parties to the said suit,

(*k*) 10 Ex. 84.
(*l*) 8 & 9 Vict. c. 87.
(*m*) Now, of the King's Bench Division.
(*n*) See the Crown Suits Act, 1865 (28 & 29 Vict. c. 104), s. 31; *R.* v. *Hausmann*, 73 J. P. 516.
(*o*) *Ex parte Crowley*, 24 L. T. (o.s.) 244.
(*p*) E. B. & E. 91.
(*q*) 16 & 17 Vict. c. 83.
(*r*) *Barbat* v. *Allen*, 7 Ex. 609; *Stapleton* v. *Crofts*, 18 Q. B. 367.

action, or proceeding." But neither husband nor wife is made compellable to disclose any *communication* whatsoever made to him or her by the other during marriage (*s*). These provisions were, by the Act, not to apply in criminal cases, nor in proceedings instituted in consequence of adultery; but, as stated above, the Evidence Further Amendment Act, 1869, made the husbands and wives of parties to proceedings instituted in consequence of adultery competent witnesses (*t*).

In criminal cases the old rule was that husbands and wives were not competent to give evidence for or against each other (*u*), and this rule prevented such witnesses from being examined either as to circumstances that happened before marriage, or as to the fact of marriage. Nor could a wife or husband be a witness for or against any person who was indicted jointly with the husband or wife (*x*); so, on an indictment for a conspiracy, the wife of one of the conspirators formerly could not give evidence in favour of the others; because their acquittal must enure to the benefit of the husband (*y*). The Evidence Act, 1851 (*z*), and the Evidence Amendment Act, 1853 (*a*), both contained provisions that neither husband nor wife should be a competent witness for or against the other in any criminal proceeding (*b*).

Statutory exceptions, however, were made to this rule. By various Acts of Parliament the husband or wife of a person charged with an offence under such Acts was made a competent and in some cases a compellable witness. And now, by the Criminal Evidence Act, 1898 (*c*), the wife or husband of a person charged with any criminal offence is made a competent witness for

(*s*) See further hereon, *post*, p. 200.
(*t*) See *ante*, p. 173.
(*u*) Co. Litt. 6 b.
(*x*) *R.* v. *Thompson*, L. R. 1 C. C. R. 377.
(*y*) *R.* v. *Locker*, 5 Esp. 107.
(*z*) 14 & 15 Vict. c. 99.
(*a*) 16 & 17 Vict. c. 83.
(*b*) On a charge of bigamy, the so-called second wife was always competent to give evidence against the prisoner.
(*c*) 61 & 62 Vict. c. 36.

the defence at every stage of the proceedings; but such a witness cannot be called except on the application of the person charged, unless the offence is under one of the six enactments mentioned in the schedule to the Act (*d*), or in cases where at common law the wife or husband of a person charged can be called without the consent of such person (*e*). Communications between husband and wife during marriage are expressly protected from compulsory disclosure by the Act (*f*).

In all cases where the husband is charged with a personal injury to the wife, or the wife with a personal injury to her husband, the injured party is at common law a competent witness against the other. Thus, when a husband was indicted for assisting another to commit a rape on his wife, she was held entitled to give evidence against him (*g*). This is confined to cases of personal injuries effected by violence or coercion, and does not extend to defamatory libels (*h*) nor to injuries to the children of the marriage. The dying declarations of a wife who has been murdered by her husband, if not otherwise inadmissible, are evidence against him (*i*). In high treason it is doubtful whether a wife can or can not be a witness against her husband (*k*); the better opinion is that she can not (*l*).

It should be observed that the Married Women's Property Act, 1884 (*m*), enacts that in any such criminal proceeding against a husband or a wife as is authorised by the Married Women's Property Act, 1882, the husband and wife respectively shall be competent and admissible witnesses, and except when defendant, compellable to give evidence.

(*d*) See *post*, pp. 184, 185.
(*e*) See *post*, p. 184.
(*f*) Section 1 (d).
(*g*) *Lord Audley's Case*, 3 How. St. Tr. 402.
(*h*) *R.* v. *Lord Mayor of London*, 16 Q. B. D. 772.
(*i*) *R.* v. *John*, 1 East, P. C. 357; *R.* v. *Woodcock*, 1 Leach, 502.
(*k*) *R.* v. *Griggs*, Sir T. Raym. 2; see Archbold, Cr. Pl. 451.
(*l*) Taylor, Ev., p. 1167.
(*m*) 47 & 48 Vict. c. 14.

In an action against a husband for necessaries supplied to his wife when living apart from him, the defence being the wife's adultery, she is admissible to prove the adultery (*n*); though such evidence would be, of course, open to suspicion.

Hence, now, the prisoner's wife can give evidence against him, without his consent, in the following cases :—

(i.) Whenever at common law she might be called as a witness without his consent (*o*).

(ii.) When the proceeding, though criminal in form, is " instituted for the purpose of enforcing a civil right only " (*p*).

(iii.) In proceedings taken under the Vagrancy Acts, 1824 (*q*) and 1898 (*r*), as amended by s. 7 of the Criminal Law Amendment Act, 1912 (*s*).

(iv.) In proceedings taken under the Offences against the Person Act, 1861 (*t*), ss. 48 to 55.

(v.) In proceedings taken under the Married Women's Property Acts, 1882 and 1884 (*u*).

(vi.) In proceedings taken under the Criminal Law Amendment Act, 1885 (*x*).

(vii.) In proceedings taken under the Prevention of Cruelty to Children Act, 1904 (*y*).

(viii.) In proceedings taken under Part II. of the Children Act, 1908 (*z*).

(*n*) *Cooper* v. *Lloyd*, 6 C. B. (N.S.) 519.
(*o*) Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 4 (1).
(*p*) Evidence Act, 1877 (40 & 41 Vict. c. 14), s. 1.
(*q*) 5 Geo. IV. c. 83.
(*r*) 61 & 62 Vict. c. 39.
(*s*) 2 & 3 Geo. V. c. 20.
(*t*) 24 & 25 Vict. c. 100.
(*u*) 45 & 46 Vict. c. 75; 47 & 48 Vict. c. 14.
(*x*) 48 & 49 Vict. c. 69.
(*y*) 4 Edw. VII. c. 15.
(*z*) 8 Edw. VII. c. 67, s. 27; and see 3 & 4 Geo. V. c. 7, s. 3 (4).

(ix.) In proceedings taken under the Punishment of Incest Act, 1908 (*a*).

But she is only *compellable* to give evidence in cases (i.) and (ii.) and, except when defendant, in case (v.) (*b*).

The same rule, of course, applies to the husband of a female prisoner.

But "the wife or husband of a person charged with bigamy may be called as a witness either for the prosecution or defence and without the consent of the person charged" (*c*).

Mental Incompetency.

Mental incompetency may be either constitutional or accidental, and in the latter case it may be either temporary or permanent. It may also arise from immaturity of age. Hence we have three classes of persons as to whom it may be said that (subject to the qualifications hereinafter mentioned) they are incompetent witnesses :—

(1) Idiots.

(2) Lunatics.

(3) Children of immature intelligence.

(1) An idiot is one that hath had no understanding from his nativity, and therefore is by law presumed never likely to attain any; and such a person is incapable of giving evidence. The presumption is always in favour of sanity; hence the *onus* of proving the unsoundness of mind of any person tendered as a witness rests on those who dispute his sanity (*d*). Deaf and dumb persons were formerly regarded as idiots, and therefore incompetent to testify, but the modern doctrine

(*a*) 8 Edw. VII. c. 45, s. 4 (4).

(*b*) See *Leach* v. *R.*, [1912] A. C. 305.

(*c*) Criminal Justice Administration Act, 1914 (4 & 5 Geo. V. c. 58), s. 28 (3).

(*d*) *Per* Lord HATHERLEY in *Harrod* v. *Harrod*, 1 K. & J. at p. 9.

is that if they are of sufficient understanding, and know the nature of an oath, they may give evidence (*e*) either by signs, or through an interpreter, or in writing. Where, however, a prisoner who was totally deaf and who could neither read nor write was arraigned for a felony and stood mute, the jury found that he was mute by the visitation of God and incapable of pleading to and taking his trial upon the indictment; on this finding it was held that the prisoner was a lunatic within the meaning of the Criminal Lunatics Act, 1800 (*f*). When a deaf and dumb witness has been pronounced competent to testify, but it appears in the course of taking his evidence that he is incompetent, his evidence may be withdrawn from the jury (*g*).

(2) A lunatic is one that hath had understanding, but by disease, grief, or other accident, has lost the use of his reason (*h*). As long as the suspension of the intelligence continues, the lunatic is an incompetent witness: but his competency is restored during a lucid interval. Moreover, the disability does not extend to cases of monomania as to some immaterial matter (*i*), nor to cases in which the hallucination permits the witness to understand the nature of the duty which is expected from him (*k*). But where a person is tendered as a witness who is believed to be suffering from monomania, a preliminary inquiry as to his capacity to give evidence must be instituted and he himself must be examined (*l*).

(3) Infants.—There is no fixed period of legal discretion under which an infant is an incompetent witness. The rule by which an infant under seven years of age cannot commit a crime, because the law presumes him

(*e*) 1 Hale, P. C. 34; *Rushton's Case*, 1 Leach, 408; *Morrison* v. *Lennard*, 3 C. & P. 127.
(*f*) *R.* v. *Emery*, [1909] 2 K. B. 81.
(*g*) *R.* v. *Whitehead*, L. R. 1 C. C. R. 33.
(*h*) 1 Bl. Com. 304.
(*i*) See *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549, overruling to some extent the decision in *Waring* v. *Waring*, 6 Moo. P. C. 341.
(*k*) *R.* v. *Hill*, 2 Den. 254; Cockle, 252.
(*l*) *Per* BACON, V.-C., in *Spittle* v. *Walton*, L. R. 11 Eq. 420.

conclusively not to have sufficient intelligence for the act, has no analogy in the law of evidence (*m*). Age is immaterial; and the question is entirely one of intelligence, which, whenever a doubt arises, the Court will ascertain to its own satisfaction, by examining the infant on his knowledge of the obligation of an oath (*n*), and, if necessary, of the obligation of a solemn affirmation under the Oaths Act, 1888 (*o*). Although tender age is no objection to the infant's competency, he cannot, when wholly destitute of religious education, be made competent by being superficially instructed just before a trial, with a view to qualify him (*p*). A judge may, however, in his discretion, postpone a trial, in order that the witness may be instructed in the nature of an oath, but the inclination of judges is against this practice.

A child of tender years, who does not in the opinion of the Court understand the nature of an oath, may now give unsworn testimony in all proceedings for any criminal offence (*q*), if, in the opinion of the Court, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; but the prisoner cannot be convicted unless the evidence of the child is corroborated in some material particular, implicating the accused (*r*).

(*m*) *Per* PATTESON, J., in *R.* v. *Williams*, 7 C. & P. 320.
(*n*) *R.* v. *Brasier*, 1 Leach, 199; Cockle, 251.
(*o*) 51 & 52 Vict. c. 46.
(*p*) *Anon.*, 1 Leach, 430, n.; *R.* v. *Nicholas*, 2 Car. & K. 246.
(*q*) Children Act, 1908 (8 Edw. VII. c. 67), s. 30, as extended by the Criminal Justice Administration Act, 1914 (4 & 5 Geo. V. c. 58), s. 28 (2).
(*r*) *R.* v. *Davies*, 114 L. T. 80; and see Corroboration, Book III., Chap. III.

INCOMPETENCY FROM DEFECT OF RELIGIOUS BELIEF.

Oath and Affirmation.

It was formerly a strict rule of law that no person was a competent witness unless he believed in a Supreme Being who would punish him, either in the present or a future life, for perjury. Under the law as it now stands, however, the evidence of atheists is admissible, subject to any observations as to its credibility.

So, too, it was formerly an established principle of English law that no witnesses were to be believed, unless they gave their evidence on oath. Exceptions to this rule were granted by the Legislature in 1833 (*s*) to satisfy the conscientious scruples of Quakers, Moravians, and Separatists; members of which sects were allowed to give evidence on affirmation instead of oath. In 1838 (*t*) all persons who had a religious belief were allowed to take an oath in such form as they should declare to be binding on their conscience; and in 1869 it was provided by s. 4 of the Evidence Further Amendment Act (*u*), that if any person called to give evidence in any court of justice objected to take an oath, or was objected to as incompetent to take an oath, such person should, if the presiding judge were satisfied that the taking of an oath would have no binding effect on his conscience, make the promise and declaration set forth in the section.

The Oaths Act, 1888 (*x*), repealed the previous statutory provisions on the subject, and enacted that:—

"1. Every person upon objecting to being sworn, and stating as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead

(*s*) 3 & 4 Will. IV. c. 49, and c. 82.
(*t*) 1 & 2 Vict. c. 77.
(*u*) 32 & 33 Vict. c. 68.
(*x*) 51 & 52 Vict. c. 46; now amended, as to the form of administering an oath, by the Oaths Act, 1909 (9 Edw. VII. c. 39), see *post*, p. 190, and by the Perjury Act, 1911 (1 & 2 Geo. V. c. 6).

of taking an oath in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath; and if any person making such affirmation shall wilfully, falsely, and corruptly affirm any matter or thing which, if deposed on oath, would have amounted to wilful and corrupt perjury, he shall be liable to prosecution, indictment, sentence, and punishment in all respects as if he had committed wilful and corrupt perjury.

2. Every such affirmation shall be as follows: 'I, A.B., do solemnly, sincerely, and truly declare and affirm,' and then proceed with the words of the oath prescribed by law, omitting any words of imprecation or calling to witness."

This Act applies to all cases in which oaths are administered in or out of court in any part of the United Kingdom.

It is noticeable that it is only an objection to take the oath emanating from the deponent that enables an affirmation to be substituted for an oath. A deponent cannot now, as he could under the Act of 1869, be objected to as incompetent to take an oath. It is also noticeable that the ground of the objection must be stated, and such ground must be one of the two mentioned in the Act, viz., absence of religious belief, or that the taking of an oath is contrary to deponent's religious belief. An objection based on any other ground, or an objection based on no stated ground, will be insufficient. The judge on a trial in court must satisfy himself that a witness is entitled to affirm before he can be allowed to give evidence on affirmation; and an objection to the witness having given evidence on affirmation when the case did not fall within this statute can be taken, even after verdict (*y*).

The mode of administering an oath is regulated by and should be adapted to the peculiar religious belief of the deponent (*z*).

If, therefore, there is any doubt as to the proper form to be adopted in administering the oath to any particular witness, such witness should be asked what form he considers binding on his conscience. If a witness is

(*y*) See *R.* v. *Moore*, 17 Cox, 458.

(*z*) 1 & 2 Vict. c. 105; and see *Omichund* v. *Barker*, Willes, 538; Cockie, 260.

sworn in the usual way as a Christian, the objection may be subsequently taken that he has been informally sworn; but if he states that the oath as administered is binding on his conscience, his answer is conclusive (*a*).

Section 5 of the Oaths Act, 1888 (*b*), provides that—

"If any person to whom an oath is administered desires to swear with uplifted hand, in the form and manner in which an oath is usually administered in Scotland, he shall be permitted so to do, and the oath shall be administered to him in such form and manner without further question."

The witness can still claim to be sworn in this manner as a matter of right.

The present procedure is now regulated by the Oaths Act, 1909 (*c*). The person taking the oath holds the New Testament (or, in the case of a Jew, the Old Testament) in his uplifted hand and says or repeats after the officer administering the oath the words prescribed for the oath in his particular case.

In civil proceedings the oath is as follows :—

"I swear by Almighty God that the evidence I shall give to the Court and jury as touching the matter in question shall be the truth, the whole truth and nothing but the truth."

In criminal cases the form of oath usually taken is as follows :—

"I swear by Almighty God that the evidence I shall give to the Court and jury sworn between our Sovereign Lord the King and the prisoner at the Bar shall be the truth, the whole truth and nothing but the truth."

(*a*) *The Queen's Case*, 2 B. & B. 284.
(*b*) 51 & 52 Vict. c. 46.
(*c*) 9 Edw. VII. c. 39.

CHAPTER V.

PRIVILEGE OF WITNESSES.

So far we have dealt with the competency of witnesses. A competent witness, who has duly taken an oath or made an affirmation, can as a rule be compelled to answer any question that may be put to him. But there are cases in which a competent witness has the right to refuse to answer certain questions, if he thinks fit. This right is quite distinct from the disability created by incompetence. If the witness be incompetent, the judge should not allow him to answer any question on the merits of the case even though he wishes to do so ; but the right to refuse to answer certain special questions is generally the privilege of the witness, which he may waive or insist on as he chooses. He alone can raise the objection ; if he does not do so, the judge will accept his answers.

There are some cases also in which a witness will not be permitted to answer a question, even if he wishes to do so. This is because some privilege intervenes which is the privilege either of another person or of the State ; in the former case that other person can waive his privilege, if he thinks fit, and permit the witness to answer, but the witness cannot waive it. In the latter case, where the State asserts its right of excluding certain kinds of evidence on the ground of public policy, the

privilege is absolute, and the wishes neither of the parties nor of the witness can prevail against it.

Questions which a witness is thus entitled to refuse to answer may be grouped under the following five heads:—

(i.) Questions tending to incriminate the witness;
(ii.) Questions tending to prove the witness's adultery;
(iii.) Questions relating to communications between husband and wife;
(iv.) Questions relating to communications with a legal adviser for the purposes of litigation;
(v.) Questions excluded on grounds of public policy (*a*).

1. *Criminating Questions.*

No man is bound to criminate himself. Hence, a witness, whether a party to the suit or not, cannot be compelled to answer any question, whether put *vivâ voce* or in the form of a written interrogatory (*b*), the answer to which may expose, or tend to expose, him to a criminal charge, penalty (*c*), or forfeiture of any kind. This rule is recognised and expressed by the Law of Evidence Amendment Act, 1851, which after making the parties to civil actions and suits competent and compellable witnesses on behalf of either party, enacts that nothing in the Act shall render any person compellable to answer any question tending to criminate himself or herself (*d*). This rule applies to cases in which answering the question tends to

(*a*) Certain documents are also privileged from disclosure on similar grounds; see *post*, p. 233 (public) and p. 248 (private).
(*b*) *Martin* v. *Treacher*, 16 Q. B. D. 507.
(*c*) As to what is an action for a penalty, see *Saunders* v. *Wiel*, [1892] 2 Q. B. 321.
(*d*) 14 & 15 Vict. c. 99, s. 3.

subject the witness to penalties abroad (*e*). If the witness, after claiming privilege, is compelled to answer, his evidence will not be admitted against him on a subsequent trial for the criminal offence (*f*).

The protection must always be claimed on oath, *i.e.*, the party claiming it must pledge his oath that the answer to a question or the production of a document would tend to criminate him (*g*).

The rule then is that a witness will not be compelled to answer a question if the Court be of opinion that the answer *might* tend to criminate him (*h*). In *R.* v. *Boyes* (*i*), COCKBURN, C.J., in delivering the judgment of the Court, said :—

"To entitle a party called as a witness to the privilege of silence the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. We indeed quite agree that if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question; there being no doubt, as observed by Baron ALDERSON in *Osborne* v. *London Dock Co.* (*k*), that a question which might appear at first sight a very innocent one might, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering. Subject to this reservation, a judge is, in our opinion, bound to insist on a witness answering, unless he is satisfied that the answer will tend to place the witness in peril" (*l*).

In that case it was held that, as the witness had been pardoned for the offence in question, and therefore could not be prosecuted in the ordinary way, he could not plead

(*e*) *U. S. A.* v. *McRae*, L. R. 3 Ch. 79. But see *King of the Two Sicilies* v. *Wilcox*, 1 Sim. (N.S.) 331.

(*f*) *R.* v. *Garbett*, 1 Den. 236; 2 Car. & K. 495.

(*g*) *Webb* v. *East*, 5 Ex. D. at p. 112; *Spokes* v. *Grosvenor Hotel Co.*, [1897] 2 Q. B. 124.

(*h*) *R.* v. *Garbett*, *supra*.

(*i*) 1 B. & S. 311; Cockle, 290.

(*k*) 10 Ex. 698.

(*l*) The above statement of the law was approved and adopted by the Court of Appeal in the case of *Ex parte Reynolds*, 20 Ch. D. 294.

the privilege. It was objected on his behalf that, as a pardon was no bar to an impeachment, he remained liable to prosecution in that manner; but this plea was rejected on the ground that there was no "reasonable ground to apprehend danger" in that way.

A witness cannot refuse to go into the box on the ground that any material question that could be asked him would tend to criminate him, and that he would refuse to answer it. The privilege can be claimed only by the witness himself after he has been sworn and the objectionable question put to him (*m*); and the witness must pledge his oath that he believes the answer will tend to criminate him. If he assigns a reason for not answering, which in the opinion of the Court is insufficient, he will be compellable to answer. He can claim his privilege at any time, and does not waive it altogether by omitting to claim it at an earlier opportunity (*n*). A judge ought to caution a witness, where a privilege exists, that he is not bound to answer (*o*).

There seems to be some doubt as to how far a witness is privileged as to answering questions tending to criminate his or her wife or husband (*p*). In *R.* v. *All Saints, Worcester* (*q*), Lord ELLENBOROUGH held that a wife was competent to answer questions criminating her husband, and that the answers were not excluded on the ground of public policy; but BAYLEY, J., was of opinion that a wife who threw herself upon the protection of the Court would not be compelled to answer. There is no doubt that a wife cannot be compelled to answer any question which may expose her husband to a charge of felony (*r*). If the privilege is that of the witness himself, and not that of another person, as in the case of legal professional

(*m*) *Boyle* v. *Wiseman*, 10 Ex. 647.
(*n*) *R.* v. *Garbett*, 1 Den. at p. 258.
(*o*) *Per* MAULE, J., in *Fisher* v. *Ronalds*, 12 C. B. 762; cf. *Paxton* v. *Douglas*, 16 Ves. 242.
(*p*) See Taylor, Ev. 1052; Phillipps, Ev. I., 72; Starkie, Ev. 204; Roscoe, N. P. 169.
(*q*) 6 Man. & S. 194.
(*r*) *Cartwright* v. *Green*, 8 Ves. at p. 410.

privilege (*s*), he may waive it and answer at his peril (*t*). The privilege extends to cases in which an answer might subject the witness to penalties or forfeitures (*u*); but he cannot refuse to answer any question, relevant to the issue, on the ground that his answer would show that he owed a debt, or would otherwise expose him to a civil action (*x*).

Some difficulties arise in the application of the general rule in consequence of the special limitations that have been put on it by several statutes, which have enacted expressly that a witness cannot refuse to answer matters to which they refer, on the ground that the answers would criminate him; but that such answers shall not be used against him in a criminal proceeding arising out of the same transaction. By the Larceny Act, 1861 (*y*), s. 85, nothing in the previous provisions therein affecting fraudulent agents, factors, bankers, attorneys, trustees, officers of companies, etc., is to entitle any such person to refuse to answer questions or interrogatories in any civil proceeding or bankruptcy investigation; and the Bankruptcy Act, 1914 (*z*), s. 166, provides that "a statement or admission made by any person in any compulsory examination or deposition before any Court on the hearing of any matter in bankruptcy shall not be admissible as evidence against that person in any proceeding in respect of any of the misdemeanours referred to in s. 85 of the Larceny Act, 1861." But a statement of affairs prepared by a debtor under the Bankruptcy Act, 1883, s. 16 (*a*), is not within these words and can be used in evidence against him on subsequent criminal

(*s*) See *post*, p. 203.

(*t*) *Paxton* v. *Douglas*, *supra*.

(*u*) *Cates* v. *Hardacre*, 3 Taunt. 424; cf. *Pye* v. *Butterfield*, 5 B. & S. 829; Cockle, 292; and *Mexborough* (*Earl of*) v. *Whitwood Urban District Council*, [1897] 2 Q. B. 111, where, in an action to enforce a forfeiture of a lease, it was held that the plaintiff could not obtain discovery on the issue relating to forfeiture.

(*x*) 46 Geo. III. c. 37.

(*y*) 24 & 25 Vict. c. 96; and see 6 & 7 Geo. V. c. 50, ss. 20—22.

(*z*) 4 & 5 Geo. V. c. 59.

(*a*) Now s. 14 of the Bankruptcy Act, 1914.

proceedings (*b*). By the Merchandise Marks Act, 1887 (*c*), s. 19 (2), nothing in the Act is to entitle any person to refuse to make a complete discovery or to answer any question or interrogatory in any action, but such discovery or answer is not to be admissible in evidence against such person in any prosecution for an offence against the Act. Again, by the Corrupt and Illegal Practices Prevention Act, 1883 (*d*), s. 59, no person called as a witness respecting an election before any Election Court is to be excused from answering questions relating to any offence at or connected with such election, on the ground that the answer might criminate or tend to criminate himself, or on the ground of privilege, provided that a witness who answers truly all questions which he is required to answer is to be entitled to a certificate of indemnity stating that he has so answered, and an answer to questions put by or before an Election Court is not to be admissible against the witness in any civil or criminal proceeding, except for perjury in respect of such evidence. This provision applies also to the examination of witnesses before election commissioners. An analogous provision is contained in the Explosive Substances Act, 1883 (*e*), s. 6 (2).

A person charged with an offence who elects to give evidence under the Criminal Evidence Act, 1898 (*f*), by s. 1 (e) thereof "may be asked," and is compellable to answer, "any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged."

Under the Bankruptcy Acts a bankrupt is liable to be examined touching his trade, dealings, and estate. The Bankruptcy Act, 1914, provides—

"(1) Where the Court makes a receiving order it shall . . . hold a public sitting, on a day to be appointed by the Court, for the examination of the debtor, and the debtor shall attend thereat, and

(*b*) *R.* v. *Pike*, [1902] 1 K. B. 552.
(*c*) 50 & 51 Vict. c. 28.
(*d*) 46 & 47 Vict. c. 51.
(*e*) 46 & 47 Vict. c. 3.
(*f*) 61 & 62 Vict. c. 36.

shall be examined as to his conduct, dealings, and property. . . . (7) The Court may put such questions to the debtor as it may think expedient. (8) The debtor shall be examined upon oath, and it shall be his duty to answer all such questions as the Court may put or allow to be put to him. Such notes of the examination as the Court thinks proper shall be taken down in writing, and shall be read over either to or by the debtor and signed by him, and may thereafter, save as in this Act provided, be used in evidence against him; they shall also be open to the inspection of any creditor at all reasonable times" (*g*).

The statements made by a debtor upon such examination are of course not admissible in evidence against any one except himself (*h*); but they are admissible against him, even if the questions are incriminatory and the debtor is in custody or under remand on a criminal charge (*i*), in any subsequent proceedings, whether under the Bankruptcy Acts or not (*k*), with the limitation enacted by s. 166 of the Bankruptcy Act, 1914. The statements can be proved not only by the transcript of the notes of the examination, but by the parol evidence of anyone present at the examination, even though they have not been read over to or signed by the debtor (*l*).

As the debtor cannot refuse to answer any questions which the Court may put or allow to be put to him, it is obviously the duty of the Court to be careful not to allow questions to be put the answers to which might be incriminatory, unless such questions fairly relate to the "conduct, dealings, or property" of the debtor.

There are several other statutes giving various degrees of protection to witnesses whom they compel to answer questions. And by Order XXXVI. r. 38, "the judge may in all cases disallow any questions put in cross-examination of any party or other witness which may appear to him to be vexatious, and not relevant to any matter proper to be inquired into in the cause or matter." And generally it seems to be clear that, whenever a witness is asked a

(*g*) 4 & 5 Geo. V. c. 59, s. 15.

(*h*) *New, Prance and Garrard's Trustee* v. *Hunting*, [1897] 2 Q. B. 19; affirmed in *Sharp* v. *Jackson*, [1899] A. C. 419.

(*i*) *In re Atherton*, [1912] 2 K. B. 251.

(*k*) *In re A Solicitor*, 25 Q. B. D. 17; see *R.* v. *Erdheim*, [1896] 2 Q. B. 260; and 6 & 7 Geo. V. c. 50, s. 43 (2) and (3).

(*l*) *R.* v. *Erdheim, supra.*

question which is derogatory to his character and is not material to the issue, he may refuse to answer it. Thus on a charge of rape, or indecent assault, the prosecutrix cannot be compelled to say whether she has had connection with other men, or particular persons; nor can other evidence of such connection be received, for if she has once denied it her answer is final (*m*). But she can be asked if she has had previous connection with the accused, and if she denies it her answer is not final, and witnesses can be called to prove such previous connection (*n*). So, in an action of seduction, the woman cannot be compelled to say whether she has had connection with other men previous to the alleged seduction; but the defendant may prove such previous connection in reduction of damages (*o*).

Equity carried the general rule further than common law, for not only is a witness not compelled to answer any question which would subject him to a criminal charge, or to any pains or penalties, but he is not compelled to answer any question which would subject him to ecclesiastical censure (*p*), or to a forfeiture of interest. But the protection does not extend to cases where the answer would prove the witness guilty of great moral turpitude, unless it would subject him to penal consequences.

But when privilege is claimed under this head, it does not necessarily last for ever. When the reason for the privilege ceases, the privilege will cease also; and therefore, if a penalty or forfeiture would enure for the benefit of a plaintiff and he waives the same, or when the time for suing for a penalty has expired, a witness is compellable to answer, notwithstanding the consequences, as also he is if by contract he is bound to answer. So also a witness is compellable to answer if the only person entitled to sue for the penalty or

(*m*) *R.* v. *Holmes*, L. R. 1 C. C. R. 334.
(*n*) *R.* v. *Riley*, 18 Q. B. D. 481.
(*o*) *Dodd* v. *Norris*, 3 Camp. 519.
(*p*) *Redfern* v. *Redfern*, [1891] P. 139.

enforce the forfeiture is dead (*q*), or if the offence has been pardoned (*r*).

2. *Admissions of Adultery.*

No witness in any proceeding instituted in consequence of adultery, whether a party to the suit or not, is liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery (*s*).

This rule is operative only in suits instituted in consequence of adultery. It does not protect a person coming forward as a witness to disprove an act of adultery, from being cross-examined as to other acts of adultery, provided they are charged in the pleadings either specifically or generally (*t*). The protection can be claimed by the witness only (*u*), and if it is not claimed the evidence is admissible. Apart from the provisions of the Act of 1869, parties to proceedings instituted in consequence of adultery are now in respect of examination and cross-examination on the same footing as other witnesses. In *Allen* v. *Allen* (*x*) the Court of Appeal was disposed to hold, but did not hold, that the judge was wrong in refusing to allow the co-respondent to cross-examine the respondent, and yet in his summing-up contrasting the evidence given by the one with the evidence given by the other. As they held the judge wrong in the latter matter, they thought it unnecessary to "express a concluded opinion"

(*q*) *Anon.*, 1 Vern. 60.
(*r*) *R.* v. *Boyes*, 30 L. J. Q. B. 301.
(*s*) The Evidence Further Amendment Act, 1869. This has already been dealt with, *ante*, p. 173.
(*t*) *Brown* v. *Brown*, L. R. 3 P. & D. 198.
(*u*) *Hebblethwaite* v. *Hebblethwaite*, L. R. 2 P. & D. 29.
(*x*) [1894] P. 248.

on the former, which is to be regretted, as the point still appears to be left open.

Recently, upon the hearing of an issue, directed for the purpose of determining the status of a child, born of the respondent during wedlock, the co-respondent in previous divorce proceedings was called as a witness, and a question was put to him as to his adultery. It was held that he was bound to answer the question, as the proceedings were "not in consequence of adultery, but as following from the fact that a divorce has been obtained" (*y*).

Of course a witness is protected by section 3 of the Act from answering questions put by interrogatory, as well as oral examination. But further than this, in the Probate, Divorce and Admiralty Division, no discovery either by interrogatory or affidavit of documents will be allowed which is addressed solely to the issue of adultery (*z*).

3. *Matrimonial Communications.*

No witness can in any case be compelled to disclose any communication made to him or her by his wife or her husband during marriage, whether such communication was of a confidential nature or not (*a*); whether the witness is a party to the action or not; and (apparently) whether the marriage is still subsisting or not (*b*).

This was an accepted rule of the common law, although there is little express authority for it. But it is now clearly recognised by statute; in civil cases by the Evidence Amendment Act, 1853 (*c*), and in criminal

(*y*) *Evans* v. *Evans*, [1904] P. 378.
(*z*) *Redfern* v. *Redfern*, [1891] P. 139.
(*a*) *O'Connor* v. *Majoribanks*, 4 Man. & G. 435.
(*b*) *Monro* v. *Twistleton*, Peake, Add. Ca. 221.
(*c*) 16 & 17 Vict. c. 83, s. 3.

cases by the Criminal Evidence Act, 1898 (*d*), both of which provide that:—

"No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage."

There may, perhaps, be some doubt as to whether the privilege applies after the marriage has ceased by dissolution or death. The statutory provisions above referred to mention "husband" and "wife" only, not widows or widowers or divorced persons. But such persons were generally considered to be within the privilege before the statutes, and would seem to be so now, as there is nothing restrictive in the words used by the statutes.

The communications, in order to be privileged, must have been made during marriage. A communication made to a man by a woman to whom he was afterwards married must be disclosed. Third persons can, it would seem, give evidence of statements made between husband and wife which they heard (*e*).

4. *Communications with Members of the Legal Profession.*

Counsel, solicitors, and their clerks are not permitted to disclose communications which have been made to them in professional confidence by their clients, without the consent of such clients; nor can a witness be compelled to disclose any communication which he has made in professional confidence to his solicitor or his counsel.

The privilege applies to any communication between solicitor and client, whether made before

(*d*) 61 & 62 Vict. c. 36, s. 1 (d).
(*e*) *R.* v. *Smithies*, 5 C. & P. 332; *R.* v. *Simons*, 6 C. & P. 540.

or during litigation, or without reference to any litigation, provided they are professional communications passing in a professional capacity.

This privilege extends to all information and evidence obtained by a legal adviser himself, or by the client or anyone else by the direction of such legal adviser, provided it be obtained for the purpose of some actual or contemplated litigation, and whether actually communicated to the legal adviser or not.

Without the protection afforded by this rule, no man would dare to consult a barrister or solicitor with a view to his defence or to the enforcement of his rights (*f*).

When once the relation of solicitor and client, or of counsel and client, has been established, then this rule operates, and neither solicitor nor counsel can be compelled, or will be permitted (*g*), without the consent of the client, to make any disclosure or admission of any fact which can be fairly presumed to have been communicated by the client, with reference to the matter in issue, under an implied promise of secrecy. It makes no difference whether there is at the moment litigation impending or existing or not, or whether the communication was necessary for the purposes of such litigation or not, if the client honestly believed that it was necessary to make the communication (*h*). So, a communication with a solicitor for the purpose of obtaining legal advice is protected, though it relates to a matter which is not the subject of litigation, provided it be a communication made to the solicitor in that character and for that purpose (*i*).

(*f*) *Per* Lord BROUGHAM, in *Bolton* v. *Corporation of Liverpool*, 1 Myl. & K. 94.

(*g*) *Wilson* v. *Rastall*, 4 T. R. 759.

(*h*) *Per* MARTIN, B., in *Cleave* v. *Jones*, 6 Ex. 573.

(*i*) See *Minet* v. *Morgan*, L. R. 8 Ch. 361; and the judgment of JESSEL, M.R., in *Wheeler* v. *Le Marchant*, 17 Ch. D. 682.

Where a witness, at his private examination in the liquidation of a company, was represented by a solicitor who had had in his possession documents belonging to the company, which had been wrongfully handed to him by a servant of the company, it was held that his privilege as a solicitor excused his answering from whom he received such documents (*k*).

When a communication is once privileged, it is "always privileged" (*l*). That is to say, the privilege continues for the purpose of future litigation, notwithstanding a change of solicitors, or that the solicitor is struck off the rolls (*m*), or the solicitor becomes personally interested (*n*), or the client dies (*o*). The privilege is the privilege of the client, and may be waived by him, but no presumption adverse to him arises from his not waiving it (*p*). The solicitor cannot waive it without the consent of his client. No waiver arises from the client calling the solicitor as a witness, unless he is examined in chief as to the privileged matter (*q*).

Although a solicitor cannot refuse to divulge the name of his client (*r*), he can refuse to divulge his client's address when communicated to him confidentially (*s*). The privilege does not terminate with the relationship, so when a solicitor has ceased to act for a client he will be restrained by injunction from divulging what he has learnt from his old client to any new one (*t*); and when a solicitor is personally defendant in an action, he cannot be compelled to answer interrogatories so as to disclose

(*k*) *In re London & Northern Bank, Ltd., Hoyle's Case*, [1903] 2 Ch. 73, 78.
(*l*) *Bullock* v. *Corry*, 3 Q. B. D. 356, *per* COCKBURN, C.J.; *Calcraft* v. *Guest*, [1898] 1 Q. B. 761, *per* LINDLEY, L.J.
(*m*) *Cholmondeley* v. *Clinton*, 19 Ves. 268.
(*n*) *Chant* v. *Brown*, 7 Hare, 79.
(*o*) See *Bullivant* v. *Attorney-General for Victoria*, [1901] A. C. 196.
(*p*) *Wentworth* v. *Lloyd*, 10 H. L. Cas. 589.
(*q*) *R.* v. *Leverson*, 11 Cox, 152; *Lyell* v. *Kennedy*, 27 Ch. D. 1.
(*r*) *Bursill* v. *Tanner*, 16 Q. B. D. 1.
(*s*) *Re Arnott*, 5 Morrell, 286.
(*t*) *Lewis* v. *Smith*, 1 M. & G. 417; see *Little* v. *Kingswood Collieries Co.*, 20 Ch. D. 733.

facts and information which came to his knowledge as solicitor for a client in another action (*u*).

So, too, the privilege extends to all knowledge obtained by a solicitor which he would not have obtained if he had not been consulted professionally by his client (*x*); but if a solicitor was aware of the fact from any other source before it was communicated to him by his client, his knowledge is not privileged (*y*).

The rule of professional confidence is held to extend to all cases in which the solicitor or counsel has been confided in as such, but not to cases where the confidence was given before the relation was formed, or after it has ceased (*z*).

The privilege is also held to extend to the clerks of solicitors and barristers to whom communications have been made as such (*a*); and to an unprofessional agent employed by a solicitor's advice to obtain information for a client (*b*); but not to cases where the communication has been made to the solicitor (*c*), or his clerk (*d*), while they have not been acting in their professional character. It extends to communications to a solicitor who ultimately refuses a retainer (*e*), and to communications made to a solicitor under the mistaken impression that he had agreed to act in the matter (*f*). A person who is not a solicitor, in whom confidence has been placed under a mistaken idea that he is a solicitor, will not be compelled to disclose the communication (*g*).

Where two persons are engaged in a joint adventure,

(*u*) *Procter* v. *Smiles*, 55 L. J. Q. B. 467, 527; cf. *Watson* v. *Jones*, [1905] A. C. 480.
(*x*) *Greenough* v. *Gaskell*, 1 Myl. & K. 101.
(*y*) Cf. *Lewis* v. *Pennington*, 29 L. J. Ch. 670.
(*z*) *Cobden* v. *Kendrick*, 4 T. R. 431; *Wilson* v. *Rastall*, 4 T. R. 759; *Gainsford* v. *Grammar*, 2 Camp. 9; and cf. *Clark* v. *Clark*, 1 M. & Rob. 3.
(*a*) *Taylor* v. *Forster*, 2 C. & P. 195; *Foote* v. *Hayne*, R. & M. 165.
(*b*) *Lafone* v. *Falkland Islands Co.* (No. 1), 4 K. & J. 34.
(*c*) *R.* v. *Brewer*, 6 C. & P. 363.
(*d*) *Doe* v. *Jauncey*, 8 C. & P. 99.
(*e*) *Cromack* v. *Heathcote*, 2 B. & B. 4.
(*f*) *Smith* v. *Fell*, 2 Curteis, 667.
(*g*) *Calley* v. *Richards*, 19 Beav. 401.

communications made during its continuance by one to the solicitor of the other are privileged (*h*). And although letters written between co-defendants *simpliciter* are not privileged, yet a letter written by one co-defendant to another, with directions to send it to the joint solicitor, is (*i*). Where two parties employ the same solicitor, a letter by one of them to him, containing an offer to be made to the other, may be given in evidence against the writer (*k*); but in such case the joint solicitor cannot disclose the title of either. Thus, where a borrower and lender employ the same solicitor, he cannot be called to prove the abstract of the borrower's title as against the borrower (*l*).

A person cannot, it is true, protect himself from disclosing what he knows about a matter merely by saying that he has told what he knows to his solicitor, but he cannot be compelled to divulge his knowledge, information, and belief on any matter of fact as to which he has no personal knowledge, but only a knowledge or information derived from privileged communications made to him by his solicitor or the agent of his solicitor (*m*). If, however, a person having obtained information from his solicitor verifies it for himself—as if, being told by his solicitor that there is a tombstone in a particular place, he goes and looks at it—then his knowledge is no longer privileged.

When a statement has been made by either plaintiff or defendant, in the presence of the solicitor of the opposite party, the solicitor may be called to prove it (*n*). No communications made to a solicitor by or on behalf of the opposing litigant can be confidential (*o*).

In an action for false imprisonment and malicious

(*h*) *Rochefoucauld* v. *Boustead*, 74 L. T. 783.
(*i*) *Jenkyns* v. *Bushby*, L. R. 2 Eq. 548.
(*k*) *Baugh* v. *Cradocke*, 1 M. & Rob. 182.
(*l*) *Doe* v. *Watkins*, 3 Bing. N. C. 421; cf. *R.* v. *Avery*, 8 C. & P. 596.
(*m*) *Lyell* v. *Kennedy*, 9 App. Cas. 81.
(*n*) *Griffith* v. *Davies*, 5 B. & Ad. 502; *Desborough* v. *Rawlins*, 3 Myl. & Cr. 515.
(*o*) *Per* COTTON, L.J., in *Lyell* v. *Kennedy*, 23 Ch. D. 405.

prosecution, it became a material question whether an entry in a book, by which the plaintiff acknowledged the receipt of money which the defendant had charged him with embezzling, existed at the time when the plaintiff was examined before the magistrates, or had been made, as the defendant alleged, by the plaintiff between the examination and the trial. The counsel, who had been concerned for the plaintiff before the magistrate, but who was not concerned for him on the trial, happened to be in Court on the latter occasion; and at the suggestion of JERVIS, C.J., after consulting CRESSWELL, J., he was called for the defendant, and asked whether the entry was in the book at the time of the examination before the magistrate. He gave evidence that it was not; and a verdict passed for the defendant. On a rule for a new trial on the ground that this evidence was improperly admitted, the Court held that it was properly admitted, because the witness was required only to disclose something which he had seen in Court and not what he had been told in his position as counsel (*p*).

Where a communication between a solicitor and his client appears to be of an irrelevant or non-professional character, the solicitor will be compelled to disclose it; and therefore a solicitor will be compelled to state what his client has said to him on a matter in which the latter was not asking for legal advice, but only for information as to a matter of fact, even though that fact involved a question of law. Thus, in *Bramwell* v. *Lucas* (*q*), an action by assignees to prove an act of bankruptcy, it was held that the solicitor to the bankrupt was not privileged from saying whether his client had asked his opinion, whether he (the client) could attend a meeting of his creditors without danger of being arrested. The Court held that the communication was not privileged, but this decision has been much questioned (*r*).

(*p*) *Brown* v. *Foster*, 1 H. & N. 736.
(*q*) 2 B. & C. 749.
(*r*) See *Greenough* v. *Gaskell*, 1 Myl. & K. 98; *Desborough* v. *Rawlins*, 3 Myl. & Cr. 515.

When a solicitor is a party with his client to a fraud, no privilege attaches to the communications with him upon the subject (*s*). This is because the rule protecting communications between solicitor and client does not apply to all such communications, but only to those which pass in professional confidence, and the contriving of fraud forms no part of the professional occupation of a solicitor (*t*). This principle is not restricted to fraud, but extends to any illegal purpose. But to displace the *primâ facie* privilege there must be a definite charge of some sufficient illegality established to the satisfaction of the Court (*u*). It is not necessary that both the client and solicitor should be parties to the illegal transaction for the principle to apply (*x*). If the client's purpose is dishonest and the solicitor is innocent, the communication is not privileged (*y*).

A communication made to a solicitor in furtherance of any criminal purpose does not come within the scope of professional employment, and therefore communications made to a solicitor by his client before the commission of a crime, for the purpose of being guided or helped to the commission of it, are not privileged, and this whether the solicitor was or was not aware of his client's intentions; if he was so aware, then the communication would not be in the course of any professional employment; if he was not aware, then there is no professional confidence. It is perfectly legitimate for an accused person after the commission of a crime to consult his legal adviser for the purpose of being defended; but this must be clearly distinguished from a case in which he seeks the advice of his solicitor before committing a crime for the purpose of being guided or helped in committing it (*z*).

(*s*) *Russell* v. *Jackson*, 9 Hare, 392.

(*t*) *Per* Lord CRANWORTH in *Follett* v. *Jefferyes*, 1 Sim. (N.S.) at p. 17.

(*u*) *Bullivant* v. *Attorney-General for Victoria*, [1901] A. C. 196.

(*x*) *Charlton* v. *Coombes*, 4 Giff. 372.

(*y*) See *Williams* v. *Quebrada Rail. Co.*, [1895] 2 Ch. 751.

(*z*) See the judgment of STEPHEN, J., in *R.* v. *Cox*, 14 Q. B. D. 153; approved and followed in *R.* v. *Smith*, [1915] W. N. 309; 84 L. J. K. B. 2153.

It was held that where a person had absconded with two wards of Court, his solicitor must produce the envelopes of the letters received from him, such envelopes not being privileged communications, and that, even if they were, a solicitor could not aid and abet in concealing from the Court of Chancery the residence of its wards (*a*).

The rule of privileged communications has been strictly confined by the English law to the cases which have been mentioned (*b*). It does not extend to communications made confidentially to friends (*c*), stewards (*d*), medical men (*e*), or patent agents (*f*). When a secret is entrusted to a person confidentially employed, the Court will restrain such person from making use of the secret, or divulging it to others (*g*). A pursuivant of the Heralds' College is not a legal adviser for this purpose (*h*).

But it must not be supposed that every confidential communication is protected. Communications to clergymen and priests are, strictly, not privileged (*i*); but judges have shown themselves indisposed to compel the disclosure of communications which have been made to clergymen as such. BEST, C.J., is reported to have said on one occasion that he would never compel a clergyman, if he objected, to disclose such communications (*k*); and in a case (*l*) where a woman was indicted for the murder of her child, ALDERSON, B., objected to hear the chaplain of the prison as a witness to conversations which he had

(*a*) *Ramsbotham* v. *Senior*, L. R. 8 Eq. 575.
(*b*) *Jones* v. *Great Central Rail. Co.*, [1910] A. C. 4; approving *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644 (*per* JAMES, L.J., at p. 656). As to conversations "without prejudice," between the parties, see *post*, p. 253.
(*c*) *Wheeler* v. *Le Marchant*, 17 Ch. D. 675.
(*d*) *Earl of Falmouth* v. *Moss*, 11 Price, 455.
(*e*) *Duchess of Kingston's Case*, 20 How. St. Tr. at p. 613.
(*f*) *Moseley* v. *Victoria Rubber Co.*, 55 L. T. 482.
(*g*) *Morrison* v. *Moat*, 9 Hare, 241.
(*h*) *Slade* v. *Tucker*, 14 Ch. D. 824.
(*i*) *Normanshaw* v. *Normanshaw*, 69 L. T. 468.
(*k*) *Broad* v. *Pitt*, M. & M. 233.
(*l*) *R.* v. *Griffin*, 6 Cox, C. C. 219.

had with the prisoner in his spiritual capacity. Yet in 1905 a clergyman of the Church of England was committed to prison by a metropolitan police magistrate for seven days for refusing to state what had been disclosed to him in confession (*m*). The communications made to a medical man whose advice is sought by a patient with respect to the probable origin of the disease as to which he is consulted, and which must necessarily be made in order to enable the medical man to advise or to prescribe for the patient, are not protected. Neither are communications made to a friend with respect to matters of the most delicate nature, on which advice is sought with respect to a man's honour or reputation. Bankers are bound not to disclose the state of a customer's account, except upon a reasonable and proper occasion, and what is a reasonable and proper occasion is a question for the jury (*n*). But the banker of a contributory can be compelled to give evidence as to his account under s. 174 of the Companies (Consolidation) Act, 1908 (*o*).

5. *Disclosures Prejudicial to the Public Interest.*

A witness cannot be asked, and will not be allowed, to give evidence as to facts the disclosure of which will be prejudicial to the public interest.

The Court will, as a rule, disallow any questions as to the source from which the police received valuable information in any criminal matter. Thus in *Hardy's* trial for high treason (*p*) it was held that a witness should not be compelled to disclose the name of the person to whom he had communicated a report of the proceedings of an alleged seditious society. So the Director of Public Prosecutions cannot be asked to disclose the name of his informant upon a criminal trial or any subsequent civil

(*m*) See Best on Evidence, 11th edition, p. 123.
(*n*) *Hardy* v. *Veasey*, L. R. 3 Ex. 107.
(*o*) 8 Edw. VII. c. 69; and see *Jones* v. *Great Central Rail. Co.*, [1910] A. C. 4.
(*p*) 24 How. St. Tr. 119.

proceedings arising out of it. On a criminal trial, "if the judge sees that the strict enforcement of the rule would be likely to cause a miscarriage of justice, he may relax it *in favorem innocentiæ*" (*q*).

On the same principle a member of the Privy Council cannot be made to disclose what happened at a meeting of the Council.

Judges, arbitrators and jurors are privileged from disclosing information obtained in matters in which they have been judicially or professionally engaged.

Official correspondence relating to matters of State cannot be produced as evidence in an action brought against a person holding office for a wrongful act alleged to have been done by him in exercise of the power given to him as such officer; not only because such communications are confidential, but because their disclosure might betray secrets of State policy (*r*).

It should be particularly observed that, where a matter is privileged on the grounds of public policy, secondary evidence of it is equally inadmissible (*s*). It is otherwise in the case of private privilege.

That the matter which it is proposed to prove is of a grossly indecent nature is no objection to its being given in evidence, if it be relevant to any question in issue in the case before the Court. This is so in all criminal cases and, it seems, in civil cases also. "Indecency of evidence is no objection to its being received where it is necessary to the decision of a civil or criminal right" (*t*). But in civil cases the parties often make arrangements to avoid as far as possible any outrage on public decency. In such cases, too, the judge often requests women and children who are not concerned in the case to leave the Court (*u*).

(*q*) See *per* BOWEN, L.J., in *Marks* v. *Beyfus*, 25 Q. B. D. at p. 500.

(*r*) *Anderson* v. *Hamilton*, 2 B. & B. 156 n.

(*s*) See Odgers on Libel and Slander, 5th edition, p. 679.

(*t*) *Per* Lord MANSFIELD, C.J., in *Da Costa* v. *Jones*, Cowp. 729.

(*u*) As to non-access, see *ante*, p. 174; and *post*, pp. 343, 344.

CHAPTER VI.

PROOF OF PUBLIC DOCUMENTS.

In the first place, every document tendered in evidence must be relevant to some issue in the action. Many documents which a layman might deem material are not evidence at all in the law courts. A written statement made by one party is not evidence against the other, unless it be shown to have been in some way recognised or adopted by him. Statements contained in a letter written to a party by a third person are not evidence against the recipient, unless he has made them so by answering the letter or acting upon it in some other way (*a*); still less are they evidence against the other party. A private memorandum drawn up by a witness for his personal convenience is not evidence at all, though the witness may sometimes use it for the purpose of refreshing his memory (*b*). But a document which was irrelevant when the pleadings were opened may become relevant as the case proceeds. Thus, as we have seen (*c*), cross-examination will often let in a document which till then was inadmissible. And though a document which a witness, called by one party, uses merely for the purpose of refreshing his memory is generally not

(*a*) *Wright* v. *Doe*, 4 Bing. N. C. 489; Cockle, 72.
(*b*) See *ante*, pp. 151, 152.
(*c*) See *ante*, p. 123.

evidence against the other party in the action, yet the counsel for that other party may make such document evidence if he thinks fit (*d*).

Next, if the document be not admitted, it must be proved. The method of proving a public document differs materially from that which is necessary in the case of a private document. It, however, resembles the proof of a private document in two particulars: the original document must be produced, unless the circumstances are such as to render secondary evidence of it admissible (*e*); and it must be properly stamped, if a stamp be required by law, otherwise it cannot, without payment of a penalty, be read in evidence, whether for the purpose of enforcing it or for a collateral purpose, except in criminal proceedings (*f*). The proof of public documents has been much simplified by modern legislation. In this chapter we shall deal with public documents only, leaving private documents until the next chapter.

It is not always easy to determine whether a particular writing is a public or a private document. But a public document is defined by Lord Blackburn in *Sturla* v. *Freccia* (*g*), as "a document that is made for the purpose of the public making use of it, and being able to refer to it . . . where there is a judicial or quasi-judicial duty to inquire."

The term is generally understood to include all

(*d*) See *ante*, pp. 123, 124.
(*e*) As to when secondary evidence is admissible, see *post*, p. 307.
(*f*) *Fengl* v. *Fengl*, [1914] P. 274. As to when a stamp is required, see *post*, p. 254.
(*g*) 5 App. Cas. pp. 643, 644.

such documents as Acts of Parliament and Parliamentary papers, bye-laws, all records whether judicial or non-judicial, the process of any Court of law, probates of wills and letters of administration, papers belonging to or issued by the departments of State, Royal Commissions, municipal corporations and trading companies, entries in all public registers, Royal proclamations, and all other acts of State.

In Lord Blackburn's definition of a public document, cited above, the word "public" is not to be taken in the sense of meaning the whole world. "An entry in the books of a manor is public in the sense that it concerns all the people interested in the manor (*h*). And an entry probably in a corporation book concerning a corporate matter, or something in which all the members of the corporation are concerned, would be 'public' within that sense" (*i*).

But if a document be prepared by a Government official for a temporary purpose only, it is not a "public document." Thus, a survey of Walmer Castle taken in the year 1816 by the direction of the then Lord Warden of the Cinque Ports, and an estimate made by the King's engineer for the reparation of Walmer and other castles, though produced from the Record Office, were held not admissible in evidence as "public documents," on the ground that they were not, and were not intended to be, records affecting the King's property or revenues, but were to serve temporary purposes only, and in no way affected Crown property, Crown revenues, or Crown grants when the respective purposes were served (*k*).

In order to avoid the necessity for conveying public records up and down the country, many

(*h*) But see *Beaufort* v. *Smith*, 4 Ex. 450, and *post*, p. 298.
(*i*) *Sturla* v. *Freccia*, 5 App. Cas. at p. 643.
(*k*) *Mercer* v. *Denne*, [1905] 2 Ch. 538.

statutes have been passed, which make copies of registers and other public and official documents admissible in evidence to the same extent as the originals would be admissible, provided such copies be duly authenticated in the manner prescribed. These copies are of four kinds :—

(i.) An examined copy ; *i.e.*, a copy which someone, who is called as a witness, swears he has compared with the original, and found to be correct and complete. He must either himself have compared the copy word for word with the original or have examined the copy while another person read the original aloud to him ; the other person need not be called.

(ii.) A certified copy or certificate ; *i.e.*, a copy which some public officer, officially in charge of the original, certifies to be a true copy ; he need not be called as a witness if he has properly sealed or stamped or otherwise authenticated the copy.

(iii.) An office copy ; *i.e.*, a copy made in the office of the High Court of Justice by an officer having custody of the original.

(iv.) A copy printed by the official printer, under the direction of either House of Parliament or any department or officer of State.

An office copy of a record is admitted in evidence upon the credit of the officer without proof that it has been actually examined, and it has always been regarded, even at common law, as equivalent to the record itself, when it was tendered in evidence in the same Court and in the same cause (*l*). It has, however, acquired

(*l*) *Per* Lord MANSFIELD, in *Den* v. *Fulford*, 2 Burr. 1179.

a far wider admissibility by virtue of the Rules of the Supreme Court, 1883, for Order XXXVII., r. 4, provides that:—

"Office copies of all writs, records, pleadings, and documents filed in the High Court shall be admissible in evidence in all causes and matters, and between all persons and parties, to the same extent as the original would be admissible."

Every copy, whatever its nature, must be complete and accurate, and not contain abbreviations which are not in the original (*m*), and it must appear on the face of it that the original was in the custody of the proper officer at the time when the copy was taken (*n*).

The party who wishes to give evidence of the contents of any public document must take care to obtain the proper kind of copy which is made admissible by the particular statute. Such copy is in fact raised to the rank of primary evidence. If he relies on any certificate of birth, death or marriage, or of the conviction or acquittal of any person who was charged with the commission of a crime, he must also be prepared with evidence to show that the person named in such certificate is the person of that name mentioned in the proceedings; this is called "evidence of identity."

Most public documents can be proved by either an examined or a certified copy, for the Evidence Act, 1851 (*o*), enacts as follows:—

"Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production

(*m*) *R.* v. *Christian*, Car. & M. 388.
(*n*) See further as to copies, *post*, p. 311 *et seq.*
(*o*) 14 & 15 Vict. c. 99, s. 14. This Act virtually supersedes the Documentary Evidence Act, 1845 (8 & 9 Vict. c. 113), s. 1, so far as it refers to public documents. And see *Permanent Trustee, &c., Co.* v. *Fels*, [1918] A. C. 879.

from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any Court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words."

Official documents signed by a Secretary of State, entries from the books of the commissioners of excise or customs, registers of municipal or parliamentary electors, and many other non-judicial public documents are provable in the manner provided by this section, and are then evidence of the matter they purport to declare; provided they appear to have been obtained from proper custody, *i.e.*, from a place where it is reasonable to presume they would be deposited, if authentic (*p*).

So charters, letters patent, grants from the Crown, pardons and commissions may now be proved either by originals, or by examined or by certified copies. But note that this enactment permits the substitution of a certified or an examined copy for the original only in cases in which the original, if produced, would be evidence.

Whenever, therefore, it is proposed to tender an examined or certified copy of a public document in the place of an original, the practical question is, whether the original is such a public document as is intrinsically evidence *per se* (*q*).

There are still, it seems, cases in which the originals of documents, apparently of a public nature, must be produced, and where neither certified nor examined copies are admissible (*r*). Hence, whenever a doubt exists as to whether a document is public or private,

(*p*) *Sturla* v. *Freccia*, 5 App. Cas. 641; *Mercer* v. *Denne*, [1905] 2 Ch. 538.

(*q*) *Linzee* v. *Linzee*, 29 L. J. P. & M. 128.

(*r*) See *post*, p. 218.

the prudent course will be to be provided with the original.

The kinds of public documents which are of most practical importance will now be considered.

Acts of Parliament and Parliamentary Papers.—Acts of Parliament are either public or private. Every Act passed since 1850 is a public Act, unless the contrary is expressly provided by the Act itself (*s*). English public Acts need no proof in English courts of law; our judges are supposed to be familiar with their terms. But judges, as well as counsel, always refresh their memory by referring to a King's printer's copy. If there be ground for supposing the printed copy inaccurate, reference should be made to the Parliament Roll (*t*). By 41 Geo. III. c. 90, s. 9, the Statutes of England and of Great Britain, printed and published by the King's printer, shall be received as conclusive evidence in the Irish Courts; and the Statutes of Ireland, prior to the Union, so printed and published, shall be received in like manner in any Court of civil or criminal jurisdiction in Great Britain.

Private, local, and personal Acts (*u*) (which do not contain a clause making them public Acts), Royal proclamations (*u*), the journals of either House of Parliament (*x*), orders or regulations in Council (*y*), and proclamations, orders, or regulations issued by the Lord Lieutenant of Ireland, acting alone or with the advice of the Irish Privy Council (*z*), are proved by copies purporting to be printed by the King's printer (*a*) without proof that they were in fact so printed.

(*s*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 9.
(*t*) *Price* v. *Hollis*, 1 M. & S. 105.
(*u*) Documentary Evidence Act, 1845 (8 & 9 Vict. c. 113), s. 3.
(*x*) Documentary Evidence Act, 1882 (45 & 46 Vict. c. 9), s. 3.
(*y*) Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), Schedule.
(*z*) Documentary Evidence Act, 1882, s. 4.
(*a*) Or Government printer, or printer authorised by His Majesty, or a person designated by a similar title, or, in the case of Royal proclamations and the journals of either House, by the printer to either House of Parliament.

Proclamations, orders and regulations issued by a Government department are proved in the manner set out in the Schedule to the Documentary Evidence Act, 1868 (*b*). Copies of proclamations, orders, regulations, etc., purporting to be printed under the superintendence or authority of H.M. Stationery Office, are admissible under the Documentary Evidence Act, 1882 (*c*). A print containing directions to wholesalers fixing the prices at which dried fruits could be sold, though headed "Dried Fruits (Distribution) Order, 1918," was rejected, as it bore no printer's name and no evidence was given of the making of the direction (*d*).

Except in the Judicial Committee of the Privy Council colonial statutes are not judicially noticed, and require proof. Formerly they had to be proved by examined copies under the Documentary Evidence Act, 1851 (*e*), or certified copies under the Colonial Laws Validity Act, 1865 (*f*), but they are now also provable by copies purporting to be printed by the government printer to the colony in question (*g*).

Foreign official documents, which cannot be produced here, may be proved by examined copies (*h*).

Records and other Judicial Proceedings: Supreme Court.—A record is usually proved by an office copy (*i*) or by an examined copy. But where the existence of a record is directly in issue, the record itself, if producible, strictly must be produced; and in order to do so the order of a judge or master is necessary (*k*). In practice however an exemplification or even an examined copy is

(*b*) 31 & 32 Vict. c. 37.
(*c*) 45 & 46 Vict. c. 9, extended to New Ministers and Secretaries by 6 & 7 Geo. V. c. 68.
(*d*) *Tyrrell* v. *Cole*, [1919] W. N. 10; 120 L. T. 156.
(*e*) 14 & 15 Vict. c. 99.
(*f*) 28 & 29 Vict. c. 63, s. 6; see *R.* v. *Governor of Brixton Prison*, [1907] 1 K. B. 696.
(*g*) Evidence (Colonial Statutes) Act, 1907 (7 Edw. VII. c. 16), s. 1.
(*h*) *Burnaby* v. *Baillie*, 42 Ch. D. 292.
(*i*) Order XXXVII., r. 4.
(*k*) Order LXI., r. 28.

generally received. Again, if a prisoner is charged with committing perjury on an affidavit or in a deposition, the original affidavit or deposition must be produced (*l*): so if he be indicted for forging any judicial document.

Judicial notice is taken of the following matters:—

The signature of a judge or of a master of the Supreme Court, attached to any judicial document (*m*).

The seal of the Central Office (*n*).

The seals of district registries (*o*).

The seals and signatures of commissioners for oaths and other persons authorised to administer oaths under the Commissioners for Oaths Act, 1889 (*p*).

All documents admissible in evidence of any particular in any Court of justice in Ireland (*q*).

In proceedings under Part IV. of the Companies (Consolidation) Act, 1908, of the signature of all officers of the High Court in England and Ireland (*r*), and of the Court of Session in Scotland, and of the registrar of the Court having stannaries jurisdiction, and also of the seals and stamps of the offices of those Courts, when appearing on any document made under the same Part of the Act or any official copy thereof (*s*).

The seal of a notary public in any part of His Majesty's dominions, but not of a foreign notary public (*t*). It may be remarked that the certificate of a notary public of a protest abroad of a foreign bill of exchange is evidence of that fact, but as a rule notarial or consular certificates are not evidence of facts certified, *e.g.*, the mere production of the certificate of a notary public stating that a deed

(*l*) *R.* v. *Cox*, 4 F. & F. 42; *R.* v. *Boynes*, 1 Car. & K. 65.

(*m*) Documentary Evidence Act, 1845, s. 2 (as altered by the Judicature Act, 1873).

(*n*) Order LXI., r. 7.

(*o*) Judicature Act, 1873, s. 61.

(*p*) 52 Vict. c. 10, s. 6; *Ex parte Magee*, 15 Q. B. D. 332.

(*q*) 14 & 15 Vict. c. 99, s. 10.

(*r*) But not of the Director of Public Prosecutions, *R.* v. *Turner*, [1910] 1 K. B. 346.

(*s*) Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), s. 225.

(*t*) Order XXXVIII., r. 6; *In re Davies*, [1909] W. N. 212.

had been executed before him will not in any way dispense with the proper evidence of the execution of the deed (*u*).

If evidence of the judgment of an English Court be required for use in a foreign or colonial Court, the office copy must be certified under the hand of a master, and it is often further authenticated by the Great Seal, with the signature of the Lord Chancellor.

And Order LXI., r. 7, further enacts that—

"All copies, certificates, and other documents appearing to be sealed with a seal of the Central Office shall be presumed to be office copies or certificates or other documents issued from the Central Office, and if duly stamped may be received in evidence, and no signature or other formality, except the sealing with a seal of the Central Office, shall be required for the authentication of any such copy, certificate, or other document."

Inferior Courts.—All summonses and other process issuing out of any County Court, purporting to be sealed by the seal of the Court, are, in England, received without any further proof (*x*). Orders of other inferior Courts, if of record, will be subject to the usual rule, and generally be proved by a certified exemplification (*y*). If the Court is not of record, the books containing the proceedings must be produced and proved by the proper officer, who should be subpœnaed to attend with them; but if he does not attend, or if he refuses to produce the book or document containing the order, secondary evidence cannot, it seems, be given, but the officer may be attached (*z*).

Convictions formerly had to be proved by production of the records, but 28 Vict. c. 18, s. 6, allows "a certificate containing the substance and effect of the indictment and conviction, purporting to be signed by the clerk of the Court" in which the prisoner was convicted, or his deputy, to be put in and read. This is now done if the prisoner does not admit his previous conviction. Convictions before magistrates are proved by examined copies

(*u*) *Nye* v. *Macdonald*, L. R. 3 P. C. 343.
(*x*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 180.
(*y*) *Woodcraft* v. *Kinaston*, 2 Atk. 317.
(*z*) *R.* v. *Llanfaethly*, 2 E. & B. 940; Cockle, 317.

which are made out, on application, by the clerk of the peace. In many cases also, under particular statutes, copies certified by the proper officer are sufficient evidence. Thus, a conviction or acquittal at Assizes or Quarter Sessions can be proved by a certificate given by the clerk of the Court under s. 6 of the 28 Vict. c. 18, stating the substance and effect of the indictment and conviction, without the formal parts: a conviction or acquittal at petty sessions by a similar certificate under s. 18 of the Prevention of Crimes Act, 1871 (*a*). Any proceeding in an action in the High Court of Justice can now be proved by the production of an office copy, stamped with the seal of the Central Office; no signature or other formality need be proved if the copy be stamped with the proper seal (*b*). The bye-law of a municipal corporation is proved by the production of a written or printed copy authenticated by the corporate seal (*c*).

Bankruptcy Proceedings.—The proof of bankruptcy proceedings is now regulated by ss. 26, 28 and 137—143 of the Bankruptcy Act, 1914 (*d*). Section 137 provides that a copy of the *London Gazette* containing any notice inserted therein in pursuance of this Act, shall be evidence of the facts stated in the notice, and also that the production of a copy of the *London Gazette* containing any notice of a receiving order, or of an order adjudging a debtor bankrupt, shall be conclusive evidence (*e*) in all legal proceedings of the due making and the date of the order. The effect of this section is to make the advertisement conclusive evidence, not only as regards the persons who were parties to the bankruptcy proceedings, but also as against other persons (*e.g.*, the holder of a bill of sale executed by the bankrupt), of the validity of the adjudication and of the date thereof, but the advertisement has no such effect in proceedings taken for the

(*a*) 34 & 35 Vict. c. 112. Evidence of identification must also be given.
(*b*) Order XXXVII., r. 4; Order LXI., r. 7.
(*c*) 45 & 46 Vict. c. 50, s. 24; and see 10 Vict. c. 27, s. 90.
(*d*) 4 & 5 Geo. V. c. 59.
(*e*) See *Ex parte Learoyd, In re Foulds*, 10 Ch. D. 3.

purpose of questioning or annulling an adjudication (*f*). By s. 26 (6), the report of the official receiver is made *primâ facie* evidence of the statements therein contained for the purposes of that section. It has been decided that it is also *primâ facie* evidence for the purposes of s. 16 (*g*).

Charitable Trusts.—The Charitable Trusts Recovery Act, 1891 (*h*), s. 5 (1), provides that for the purposes of any action, petition, or proceeding instituted by the Board of Commissioners under the Act, the printed reports of the Charity Commissioners

"shall be admissible as *primâ facie* evidence of the documents and facts therein stated; provided that either party intending to use any such report as evidence shall give notice of such intention in the prescribed manner to the other party."

Foreign and Colonial Judgments and other judicial records are now proved in the manner provided by the Evidence Act, 1851 (*i*). This Act is only intended to simplify proof of such matters, and does not in any way alter the previous law. These proceedings may, therefore, still be proved by examined copies (*k*).

The Act does not apply to Scotland (*l*). Any document of record in Scotland may be proved by secondary evidence. Thus, a will may be proved by a certified copy of the will, accompanied by the Scotch equivalent of a probate (*m*).

Probate Copy of a Will.—The probate copy of a will is in the nature of a public document; for it records the act of the Court in admitting the will to probate. Moreover, a copy of the probate can be seen by anyone at Somerset House on payment of a shilling.

It constitutes the proper legal proof of title in an executor to his testator's personalty, and is conclusive

(*f*) *Ex parte Geisel*, 22 Ch. D. 436.
(*g*) See *Ex parte Campbell*, 15 Q. B. D. 213.
(*h*) 54 Vict. c. 17.
(*i*) 14 & 15 Vict. c. 99, s. 7.
(*k*) *Appleton* v. *Braybrook*, 6 M. & S. 34.
(*l*) 14 & 15 Vict. c. 99, s. 18.
(*m*) *Halkett* v. *Earl of Dudley*, [1907] 1 Ch. 590.

against all the world (*n*). It ranks, therefore, as primary evidence. It is a copy of the will, sealed with the seal of the Probate Division, and attached to a certificate which states that the will has been proved and registered, and that administration of the goods of the deceased has been granted to one or more of the executors named therein. The will itself, so far as it deals with personalty, is not evidence (*o*), except where the Court is called upon to construe a disputed will, when the Court may and often does look at the original, as, for instance, to inspect an alteration or interlineation (*p*). And in such a case, where an English translation of a foreign will has been admitted to probate, the Court can look at the foreign original or a certified copy of it (*q*). If the probate be lost, it may either be proved by an examined copy, or the Court will grant an exemplification, but not another probate (*r*); or a certified copy of the entry in the act book, under 14 & 15 Vict. c. 99, s. 14, is sufficient The act book itself is also evidence, without accounting for the non-production of the probate (*s*), and under 14 & 15 Vict. c. 100, s. 14, an unstamped copy of the act book has been received as evidence of probate, to prove an executor's title (*t*). It is still doubtful if the provisions of this Act apply to Scottish wills. In *Halkett* v. *Earl of Dudley* (*u*), PARKER, J., held that it did not; but even if it did, this would not abrogate the common law. Where no act book or other record of probates is kept, it appears that the will itself, indorsed with the appointment of the executor, will be evidence (*x*).

Similar rules apply to letters of administration (*y*).

As to wills of personal estate, the rule is that (except

(*n*) *Allen* v. *Dundas*, 3 T. R. 125.
(*o*) *Pinney* v. *Pinney*, 8 B. & C. 335.
(*p*) *Turner* v. *Hellard*, 30 Ch. D. 390.
(*q*) *In re Cliff's Trusts*, [1892] 2 Ch. 229.
(*r*) *Shepherd* v. *Shorthose*, 1 Stra. 412.
(*s*) *Cox* v. *Allingham*, Jacob, 514.
(*t*) *Dorret* v. *Meux*, 15 C. B. 142.
(*u*) [1907] 1 Ch. 590, at p. 604.
(*x*) *Doe* v. *Mew*, 7 A. & E. 240.
(*y*) *Noell* v. *Wells*, 1 Lev. 235.

in proceedings for the protection of the assets) no notice can be taken of an alleged will of personal estate, unless it has been proved in an English Probate Court or in a Colonial Court having concurrent jurisdiction with the English Probate Court, or, having been proved in a Colonial Court, a copy has been deposited with and sealed by a Court of Probate in the United Kingdom under s. 2 of the Colonial Probates Act, 1892 (*z*). Of a will of personalty the probate granted by the proper Court is the proper evidence. In fact, as a rule, the original will cannot be read (*a*).

In the case of a will relating to lands, or any description of realty, it was necessary formerly to produce the original will, as the Spiritual Court had no jurisdiction over anything but personalty (*b*); but now a devise of real estate may be proved by the probate or by a sealed office copy from the Probate Division. In this case the person tendering the evidence must give ten days' notice before trial to the other party, who may, in four days after receipt of such notice, give a counter-notice that he disputes the validity of the devise, and that the original will must be produced (*c*). Even in the absence of a counter-notice the probate is only *primâ facie* evidence (*d*).

Non-Judicial Records.—By the 1 & 2 Vict. c. 94, the Master of the Rolls is made superintendent of the general records of the realm, and is empowered to make rules for the admission of such persons as ought to be admitted to the use of such records: and he is authorised personally, or by deputy, to allow copies to be made of such records. By s. 13, a certified copy of any record, sealed with the seal of the Record Office, is evidence in every case in which the original record would be admissible;

(*z*) 55 Vict. c. 6; *In re Tootal's Trusts*, 23 Ch. D. 532; but see *Ex parte Limehouse Board of Works*, *In re Vallance*, 24 Ch. D. 177.
(*a*) *Pinney* v. *Pinney*, 8 B. & C. 335.
(*b*) *Doe* v. *Calvert*, 2 Camp. 389.
(*c*) 20 & 21 Vict. c. 77, ss. 64, 65.
(*d*) *Barraclough* v. *Greenhough*, L. R. 2 Q. B. 612; and see *Waite* v. *Bingley*, 21 Ch. D. 674.

and by s. 12, any person desirous of procuring such a copy may do so at his own cost by permission of the Master of the Rolls; but such copy shall be admissible to prove the record, only after examination and certificate, under seal, by the Deputy Keeper of the Records, or one of the assistant record keepers.

Neither the seal, nor the stamp, nor the official character of the officer, need be proved to make any certified copy admissible (*e*), and if the official be merely an officer *de facto*, and not *de jure*, the copy is still admissible (*f*).

By s. 1 of the Documentary Evidence Act, 1845 (*e*), it is enacted that, whenever by any Act then in force, or thereafter to be in force,

"any certificate, official or public document, or document or proceeding of any corporation or joint stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any Court of justice, or before any legal tribunal, or either House of Parliament, or any committee of either House, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence."

Documents belonging to a corporation are not strictly of a public nature; but they are evidence to prove entries of a public character (*g*), but not to prove transactions of the corporation with the public (*h*). They appear to be evidence in the nature of admissions between members of the corporation (*i*); but not of the rights and privileges of the corporation against strangers (*k*).

(*e*) 8 & 9 Vict. c. 113.
(*f*) *R.* v. *Parsons*, L. R. 1 C. C. R. 24.
(*g*) *Marriage* v. *Lawrence*, 3 B. & Ald. 144.
(*h*) *Gibbon's Case*, 17 How. St. Tr. at p. 810.
(*i*) *Hill* v. *Manchester, etc. Water Works Co.*, 2 B. & Ad. 544.
(*k*) *Mayor of London* v. *Lynn*, 2 H. Bl. 214, n. See also Evidence

Bye-laws are public documents in the locality within which they are in force; they are generally regulated by particular statutes or charters. Parish Councils, District Councils, Borough Councils and County Councils have been authorised by various statutes to make bye-laws; and so have statutory companies (*l*). The production of a written or printed copy of any such bye-law which has the common seal of the corporation or company affixed to it will be sufficient evidence of such bye-law (*m*). The genuineness of the seal must be proved by some one who knows it (*n*), unless it be the seal of the Corporation of London (*o*), or the seal of the Apothecaries' Company, which prove themselves (*p*). In a civil action, *e.g.*, as to the carriage of goods by a railway company, any bye-law can be proved by an examined copy, for it is a public document within s. 14 of the Evidence Act, 1851 (*q*).

Public Registers.

Births, Marriages, and Deaths.—Parish registers are in the nature of records (*r*), and can, therefore, be proved under the Act of 1851 (*s*), by copies purporting to be signed by the incumbent (*t*), who, and not the parish clerk (*u*), is the proper custodian of these registers.

The register of baptisms is no evidence of the date of birth (*x*), but it is some evidence of age, as the child

Act, 1851 (14 & 15 Vict. c. 99); Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 22; and Assurance Companies Act, 1909, s. 21.

(*l*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 127.

(*m*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 45; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 24; and see *Robinson* v. *Gregory*, [1905] 1 K. B. 534.

(*n*) *Moises* v. *Thornton*, 8 T. R. 307.

(*o*) *Doe* v. *Mason*, 1 Esp. 53.

(*p*) 14 & 15 Vict. c. 99, s. 8.

(*q*) *Motteram* v. *Eastern Counties Rail. Co.*, 7 C. B. (N.S.) 58.

(*r*) *Per* Lord MANSFIELD, in *Birt* v. *Barlow*, 1 Doug. 172.

(*s*) 14 & 15 Vict. c. 99, s. 14.

(*t*) *In re Hall*, 9 Hare, Appendix, XVI.

(*u*) *Doe* v. *Fowler*, 19 L. J. Q. B. 151.

(*x*) *In re Wintle*, L. R. 9 Eq. 373; but see *Brierley* v. *Brierley*, [1918] P. 25.

must have been born before that date (*y*). Evidence of the identity of the person or persons in question with those named in the register is necessary, as the register itself is no evidence of identity (*z*).

Marriages can be solemnised in dissenting chapels, if they are duly registered for that purpose. The marriage must take place in the registered building, with open doors, between the hours of eight in the morning and three in the afternoon, within three calendar months from day of entry of notice, in presence of the registrar (or his deputy, or, if the Marriage Act of 1898 (*a*) has been adopted, in the presence of the "authorised person") and two or more credible witnesses besides the minister, if any. If the Act has been adopted, the "authorised person" can give a certificate of the due solemnisation of the marriage (*b*). The register of a marriage celebrated in a British Colony according to the rites of the Church of England is sufficient evidence of the marriage and its validity (*c*).

By the Naval Marriages Act, 1908 (*d*), where one of the parties to a marriage intended to be solemnised in England is an officer, seaman, or marine borne on the books of one of H.M. ships at sea, the captain or other officer commanding may publish the banns or receive notice of the intended marriage and give a certificate accordingly.

By the 52 Geo. III. c. 146, s. 7, verified copies of all registers of baptisms and burials are to be sent yearly by all ministers to the registrar of their diocese; and by the 6 & 7 Will. IV. c. 86, s. 38, the Registrar-General is to cause to be sealed or stamped with the seal of his office, all certified copies of entries given in his said office; and all certified copies of entries purporting to

(*y*) *R.* v. *Weaver*, L. R. 2 C. C. R. 85; *Glenister* v. *Harding*, 29 Ch. D. 992.
(*z*) *Birt* v. *Barlow*, 1 Doug. 172; *Sayer* v. *Glossop*, 2 Ex. 409.
(*a*) 61 & 62 Vict. c. 58.
(*b*) *Ibid.*, s. 7.
(*c*) *Browning* v. *Browning*, [1919] W. N. 28.
(*d*) 8 Edw. VII. c. 26.

be sealed or stamped with the seal of the said register office are to be received as evidence of the birth, death, or marriage to which the same relates, without any further or other proof of such entry; and no certified copy purporting to be given in the said office is to be of any force or effect which is not sealed or stamped as aforesaid. Non-parochial registers deposited with the Registrar-General are made evidence by 3 & 4 Vict. c. 92, extended by 21 & 22 Vict. c. 25. Copies purporting to be sealed with the seal of the office are receivable in civil cases by the 3 & 4 Vict. c. 92, s. 9, subject to the regulations of s. 11 as to notice; but in criminal cases the original register or record must be produced (s. 17), and it may be used in evidence in civil cases (s. 12).

Certified copies of Scotch parochial registers are evidence in English Courts on questions of pedigree relating to persons resident and domiciled in Scotland (*e*). A marriage in the Isle of Man was proved by production of the special licence granted by the bishop, supplemented by the evidence of the petitioner (*f*). Where two Roman Catholics were married in a Catholic Church in Ireland, Lord COLERIDGE, J, accepted the certified copy of the entry in the marriage register as sufficient evidence of the marriage (*g*). Marriages between Christians in British India are proved by producing a certificate of the marriage from the India Office (*h*).

(*e*) *Lyell* v. *Kennedy*, 14 App. Cas. 437. As to Scotch marriages since 1856, see 19 & 20 Vict. c. 96. As to Irish marriages, 7 & 8 Vict. c. 81, as amended by 26 Vict. c. 27; 33 & 34 Vict. c. 110; and 36 & 37 Vict. c. 16. As to marriages by British subjects outside the United Kingdom before British consuls, see Foreign Marriages Act, 1892 (55 & 56 Vict. c. 23). As to the marriage in England of a foreigner with a British subject, see Marriage of Foreigners Act, 1906 (6 Edw. VII. c. 40). As to the marriage in England of a Mahomedan with an English woman, see *R.* v. *Mir-Anwaruddin*, [1917] 1 K. B. 634. The last-mentioned Act does not apply where both parties are Jews, who marry according to Jewish rites.

(*f*) *Rohmann* v. *Rohmann*, 25 T. L. R. 78.

(*g*) *Bury* v. *Bury*, 35 T. L. R. 220.

(*h*) *Westmacot* v. *Westmacot*, [1899] P. 183; *Braid* v. *Braid*, 25 T. L. R. 646; *Ratcliff* v. *Ratcliff*, 1 Sw. & T. 467.

And baptisms there may be proved in the same manner (*i*).

By the Registration of Burials Act, 1864 (*k*), register books kept under the Act, or copies, are evidence of the burials entered therein.

By s. 38 of the Births and Deaths Registration Act, 1874 (*l*), it is provided that an entry or certified copy of an entry of a birth or death under the Registration Acts, 1836 and 1874, is not to be evidence of a birth or death unless it purports to be signed by some person professing to be the informant, and to be a person required by law to give information to the registrar concerning the birth or death, or purports to be made on a coroner's certificate, or in pursuance of the provisions of the Act as to registration of births and deaths at sea. An entry made under the Act of 1836 is evidence not merely of the fact but of the date of birth (*m*).

Patents and Designs.—The register of patents (*n*) and the register of designs (*o*) are *primâ facie* evidence of any matters by statute directed or authorised to be inserted or entered therein respectively. Judicial notice is to be taken of the seal of the Patent Office (*p*).

Printed or written copies or extracts, purporting to be certified by the Comptroller, and sealed with the seal of the Patent Office, of or from patents, specifications, and other documents in the Patent Office, and of or from registers and other books kept there, are evidence in all Courts, without further proof or production of the originals (*p*), and a certificate, purporting to be under the hand of the Comptroller, as to any entry, matter, or thing which he is authorised by the Act, or any general

(*i*) *Queen's Proctor* v. *Fry*, 4 P. D. 230.
(*k*) 27 & 28 Vict. c. 97.
(*l*) 37 & 38 Vict. c. 88.
(*m*) *In re Goodrich, Payne* v. *Bennett*, [1904] P. 138.
(*n*) Patents and Designs Act, 1907 (7 Edw. VII. c. 29), ss. 28 (3), 52 (3).
(*o*) *Ibid.*, s. 64.
(*p*) *Ibid.*, s. 79.

rules made thereunder, to make or do, shall be *primâ facie* evidence of the entry having been made, and of the contents thereof, and of the matter or thing having been done or left undone (*q*).

Trade Marks.—The Trade Marks Act, 1905 (*r*), provides as follows:—

By s. 40, the fact that a person is registered as proprietor of a trade mark shall be *primâ facie* evidence of the validity of the original registration and of assignments and transmissions thereof.

By s. 41, the original registration shall, after seven years, be taken to be valid in all respects, unless it was obtained by fraud, or unless the trade mark offends against the Act.

By s. 50, printed or written copies or extracts of or from the register, purporting to be certified by the Registrar and sealed with the seal of the Patent Office, shall be evidence, without further proof or production of the originals.

By s. 51, a certificate purporting to be under the hand of the Registrar, as to any entry, matter, or thing which he is authorised to make or do, shall be *primâ facie* evidence of the entry and its contents and of the matter or thing.

By s. 52 (1), all documents purporting to be orders made by the Board of Trade and to be sealed with its seal and signed by its secretary or person authorised, shall be received in evidence without further proof.

By s. 52 (2), a certificate signed by the president of the Board of Trade, that an order or act is that of the Board shall be conclusive evidence of the fact certified.

Section 15 of the Newspaper Libel and Registration Act, 1881 (*s*), provides that—

"Every copy of an entry in or extract from the register of newspaper proprietors, purporting to be certified by the registrar or his deputy for the time being, or under the official seal of the

(*q*) Patents and Designs Act, 1907 (7 Edw. VII. c. 29), s. 78.
(*r*) 5 Edw. VII. c. 15.
(*s*) 44 & 45 Vict. c. 60.

registrar, shall be received as conclusive evidence of the contents of the said register of newspaper proprietors, so far as the same appear in such copy or extract without proof of the signature thereto or of the seal of office affixed thereto, and every such certified copy or extract shall in all proceedings, civil or criminal, be accepted as sufficient *primâ facie* evidence of all the matters and things thereby appearing, unless and until the contrary thereof be shown."

Shipping Registers, etc.—The Merchant Shipping Act, 1894 (*t*), contains provisions as to the admissibility in evidence and the mode of proof of registers, entries therein and in log-books, declarations under the Act, and Board of Trade documents.

Bills of Sale must be registered (*u*) in the Bills of Sale Department of the Supreme Court, and an office copy or extract of any registered bill of sale, and affidavit of execution filed therewith, shall, in all Courts and before all arbitrators and other persons, be admitted as *primâ facie* evidence thereof and of the fact and date of registration as shown therein (*u*).

Many other statutes provide for the registration of matters of public concern and make duly authenticated extracts evidence of the contents of the registers.

It is important to observe that whenever it is the duty of a public official, either at common law or by statute, to record certain facts in any book which is intended "to be kept as a register to be referred to ever after," the book is admissible in evidence to prove, not only that such official made those entries, but also that the facts which he recorded in that book are true. And this rule extends to every public document, whether a register or not, which is "made for the purpose of the public making use of it and being able to

(*t*) 57 & 58 Vict. c. 60.

(*u*) Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), s. 8; but see *Emmott* v. *Marchant*, 3 Q. B. D. 555.

refer to it" (*x*). But documents kept by the Post Office for the purpose of showing at what times telegrams are received and sent out are not admissible in evidence as public records, as they are not documents to which the general public have access, nor the result of any public inquiry, nor the subject of any public right (*y*). "In public documents made for the information of the Crown, or all the King's subjects who may require the information they contain, the entry of a public officer is presumed to be true when it is made, and is for that reason receivable in all cases, whether the officer or his successor may be concerned in such cases or not" (*z*). "The principle . . . is . . . that it should be a public inquiry, a public document, and made by a public officer" in the discharge of a public duty (*x*). It would be otherwise if the document were prepared only for a temporary purpose (*a*). "The mere fact that a document intended for a temporary purpose is found after a long lapse of years in the archives of a Government office does not constitute it of the authority of a register" (*b*).

The rolls of a court baron or of a customary court are evidence between the lord and his copyholders or free tenants. They are the public documents, by which the inheritance of every tenant is preserved, and the records

(*x*) *Per* Lord BLACKBURN in *Sturla* v. *Freccia*, 5 App. Cas. at pp. 643, 644. This case was followed in *Evans* v. *Merthyr Tydfil Urban District Council*, [1899] 1 Ch. 241.

(*y*) *Heyne* v. *Fischel*, 110 L. T. 264.

(*z*) *Per* PARKE, B., in *Irish Society* v. *Bishop of Derry*, 12 Cl. & F., p. 668.

(*a*) *Mercer* v. *Denne*, [1905] 2 Ch. 538.

(*b*) *Per* Lord WATSON in *Sturla* v. *Freccia*, 5 App. Cas. at p. 649; and see *Evans* v. *Taylor*, 7 A. & E. 617.

of the manor court, which was anciently a court of justice, relating to all property within the manor (*c*). So in *A.-G.* v. *Antrobus* (*d*) a tithe map and award, which is produced from proper custody and has been acted upon, is admissible to show whether or not there was a public road across the fields shown on it, because it is prepared by Commissioners acting under statutory powers, as to matters which concern all the parish. "The Act requires these things to be done, not in a corner but upon notice in all the most public places . . . (and constitutes) public evidence that at the time the owner . . . knew the facts" (*e*). But it is not evidence on any matter not within the scope of the authority of the Commissioners. Again, a report by a committee to the executive government of a foreign State as to the qualifications of a particular individual for a particular post under that government, although acted on by it, is not evidence of facts stated therein concerning his nationality, place of birth, etc. (*f*).

Privilege of Public Documents.

Although the party who relies upon a public document may be prepared to lay before the Court the original or such secondary evidence of it as has been raised by statute to the rank of an original, nevertheless it is in the power of the head of any public department of State, whether a party to the action or not (*g*), to represent to the judge that in his opinion it would be prejudicial to the interests of the State that the document should be produced in

(*c*) *Per* JOYCE, J., in *Heath* v. *Deane*, [1905] 2 Ch. 86, at p. 91.
(*d*) [1905] 2 Ch. 188; and see *Smith* v. *Lister*, 64 L. J. Q. B. 154.
(*e*) *Per* STUART, V.-C., in *Giffard* v. *Williams*, 38 L. J. Ch., p. 604.
(*f*) *Sturla* v. *Freccia*, 5 App. Cas. 623; and see *Mercer* v. *Denne*, *supra*.
(*g*) *Admiralty Commissioners* v. *Aberdeen Steam Trawling Co.*, [1909] S. C. 335.

open Court; and thereupon the judge will order that the document shall not be put in evidence. It follows that the contents of the document cannot be proved in any other way, for if the original is privileged from production on the ground of public policy, the same public policy requires that no secondary evidence of it shall be given (*h*).

The objection against disclosing such evidence must be taken by the head of the public department of State, who alone is able to judge whether the disclosure of such evidence will or will not be injurious to the public service (*i*). It is not for the judge at the trial to decide that question (*k*). The strict rule on the point is that—

"The Court is entitled to have the pledge and security of the head officer of State to give the reason for the non-production of those documents which it is objected to produce, and to demand that he shall come into the witness box, and there say that he is the head of the department, and objects to such and such documents being produced, specifying them, on the ground of public policy" (*l*).

But as a rule the judge does not trouble the head of the department to attend in court in person, provided a representative from the office attends on his behalf and satisfies the judge that the mind of the responsible head of the department has been brought to bear on the question, and that he has decided that the production of the document would be injurious to the public service (*m*). Thus, in an action against an admiral in the Royal Navy to recover damages for a collision caused by his flagship, Sir R. PHILLIMORE refused the plaintiffs permission to inspect reports of

(*h*) *Home* v. *Bentinck*, 2 B. & B. 130; *Dawkins* v. *Lord Rokeby*, L. R. 8 Q. B. 255; *Asiatic Petroleum Co., Ltd.* v. *Anglo-Persian Oil Co., Ltd.*, [1916] 1 K. B. 822.

(*i*) *Beatson* v. *Skene*, 5 H. & N. 838.

(*k*) *Hughes* v. *Vargus*, 9 T. L. R. 551; *Williams* v. *Star Newspaper Co.*, 24 T. L. R. 297.

(*l*) *Per* GROVE, J., in *Kain* v. *Farrer*, 37 L. T. at p. 470.

(*m*) See *In re Joseph Hargreaves, Ltd.*, [1900] 1 Ch. 347.

the collision made by the admiral to the Lords of the Admiralty, the secretary to the Admiralty having made an affidavit that their production would be prejudicial to the public service (*n*). So Lord CAMPBELL held that a witness can refuse to produce a letter which he obtained from a Secretary of State, to whom it had been addressed in his public character, and who forbade its production (*o*).

Where an officer in the army sued a superior officer for defamation, the alleged libel being contained in evidence given by the latter before a military Court of inquiry, the House of Lords held that such evidence was not only privileged from being the subject of an action for libel, but was wholly inadmissible, since the proceedings of the Court, being delivered to the commander-in-chief, and held by him on behalf of the Sovereign, ought not to be produced except by the command or permission of the Crown (*p*).

It has been stated as the rule that if no objection is taken at a trial to produce such a document by the person in whose custody it is, it would be the duty of the judge to intervene and to refuse to allow it to be produced (*q*). But this rule must not be strained too far. Thus, in an action (*r*) for penalties against a man upon the ground that he had acted as a parish committee man, being at the same time a collector of the property tax, a clerk to the commissioners of the property tax was called, and directed to produce his books, to prove the defendant's appointment. The witness refused on the ground that he had been sworn, on his own appointment, not to disclose anything he should hear in that

(*n*) *The Bellerophon*, 44 L. J. Adm. 5; and see *Hennessy* v. *Wright*, 21 Q. B. D. 509.

(*o*) *Sykes* v. *Dunbar*, 2 Selw. N. P. (1869 ed.) 1015; *Stace* v. *Griffith*, L. R. 2 P. C. 420.

(*p*) *Dawkins* v. *Lord Rokeby*, L. R. 7 H. L. 744. And see *Anthony* v. *Anthony*, 35 T. L. R. 559.

(*q*) *Per* SMITH, L.J., in *Chatterton* v. *Secretary of State for India*, [1895] 2 Q. B. 195.

(*r*) *Lee* v. *Birrell*, 3 Camp. 337.

capacity respecting the property tax, except with the consent of the commissioners, or by force of an Act of Parliament; but Lord ELLENBOROUGH said:—

"I clearly think the oath contains an implied exception of the evidence to be given in a court of justice, in obedience to a writ of subpœna. The witness must produce the book, and answer all questions respecting the collection of the tax, as if no such oath had been administered to him."

When a document otherwise privileged is made public, the privilege ceases, *e.g.*, if a document is used in Court; but only if it is so used that it is effectually made public (*s*).

(*s*) See *Goldstone* v. *Williams, Deacon & Co.*, [1899] 1 Ch. 47.

CHAPTER VII.

PROOF OF PRIVATE DOCUMENTS.

We have dealt with public documents. The proper method of proving a private document depends upon two considerations :—

(i.) Is the document thirty years old?

(ii.) Is it such a document as the law requires to be attested? that is, Must the signature be witnessed by one or more persons who also subscribe their names in order to authenticate the signature?

If the document is less than thirty years old and is not required by law to be attested, the person tendering it need only prove the handwriting. If the document is less than thirty years old and is required by law to be attested, the person tendering it must prove its due attestation. If the document is thirty years old or more, the person tendering it may prove that it is produced from a proper custody, and in that case will not be required to prove its execution.

I. *Private Documents less than Thirty Years Old which are not required by Law to be Attested.*

The mere fact that documents happen to be attested does not matter, if they are not bound by law to be attested (*a*). Proof of the signature of

(*a*) Criminal Procedure Act, 1865 (28 Vict. c. 18), s. 7.

the parties is sufficient. The party tendering such a document must produce the original, unless the circumstances are such as to render admissible secondary evidence of its contents; and that original must be duly stamped if a stamp be required by law (*b*). Then he has only to prove the handwriting if this has not been admitted.

Let us assume that his case is that the document in question was written or signed by A. Besides calling A. as a witness, he can prove that this is so in four ways:—

(a) By calling anyone who saw A. write or sign the document in question;

(b) By calling anyone who ever saw him write anything, even if only *once* (*c*);

(c) By calling anyone who has written to A. and received back letters in the disputed handwriting purporting to come from A. (*d*), or who is otherwise acquainted with the handwriting (*e*);

(d) By comparing the document in question with any proved or admitted writing of A.'s (*f*).

If A. be a party to the action, interrogatories may be administered to him before the trial to obtain an admission that such other documents are in his handwriting (*g*), or, if A. be in court at the trial, he may, it seems, be then and there required to write something which the Court and jury may compare with the document (*h*) in dispute (*i*).

Where the handwriting of any part of a document

(*b*) As to when a stamp is required, see *post*, p. 254.
(*c*) *Garrells* v. *Alexander*, 4 Esp. 37.
(*d*) *R.* v. *Slaney*, 5 C. & P. 213.
(*e*) *Doe* v. *Suckermore*, 5 A. & E. 703; Cockle, 327.
(*f*) See *ante*, p. 44.
(*g*) *Jones* v. *Richards*, 15 Q. B. D. 439.
(*h*) *Doe* d. *Devine* v. *Wilson*, 10 Moo. P. C. at p. 530.
(*i*) As to the evidence of experts in handwriting, see *ante*, Book I., Chap. II.

provable by a copy is in dispute, the original must be produced (*k*).

II. *Private Documents Less than Thirty Years Old which are required by Law to be Attested.*

Wills, certain appointments under powers, bills of sale, and some other documents, are void in law unless attested (*l*). Therefore the attestation of such documents must be strictly proved (*m*).

The party tendering such a document must produce the original, unless the circumstances are such as to render secondary evidence admissible (*n*); and such original must be duly stamped if a stamp be required by law. Then he has only to prove that the signature to the document was duly attested.

If there be an attesting witness, alive, sane, and within the jurisdiction of the Court, he must be called. If there are several attesting witnesses, it is enough to call one only, even though more than one witness is required by law to attest the document (*o*); if all the attesting witnesses are either dead, insane or without the jurisdiction, it is sufficient to prove the handwriting of any one of them.

An attesting witness to a deed need only see it delivered: it is not necessary that he should see it signed. To a will, however, the two attesting

(*k*) *Auriol* v. *Smith*, 18 Ves. 198.
(*l*) See Book II., Chap. III.
(*m*) *Abbot* v. *Plumbe*, 1 Doug. 216; Cockle, 331.
(*n*) As to when secondary evidence is admissible, see *post*, p. 307.
(*o*) There is an exception to this in the case of the proof of a will in solemn form; the executor there can be compelled to call both witnesses: *Coles* v. *Coles*, L. R. 1 P. & D. 70.

witnesses must subscribe at the same time and in the presence of each other and of the testator (or at least probably in sight of the testator); and the testator must either have signed it or acknowledged that the signature to it is his, in the presence of them both—though they need not know that the paper is his will.

Under the common law, whenever a writing was attested, the witnesses, or one of them, had to be called to prove the due execution of the instrument; and it was not competent to a party to prove it even by the admission of the person by whom it was executed; but now it is no longer necessary to prove by the attesting witness any instrument, to the validity of which attestation is not requisite, and such instrument may be proved by admission like any other document. This is so, both in civil and criminal proceedings. Nevertheless it is still apparently the practice on *ex parte* applications in lunacy that a deed should be proved by the attesting witness or by proof of his signature if it can be obtained; if not, the document may be proved as if unattested (*p*). So, too, it has been held that on *ex parte* applications a deed cannot be proved, except by the attesting witness (*q*); but this is strictly confined to *ex parte* applications (*r*).

But an attesting witness need never be called to prove an instrument which is more than thirty years old; or when the original is withheld by an adverse party, who refuses to produce it after notice (*s*); or when the adverse party, in producing it after notice, claims an interest under it (*t*); or when the adverse party has recognised the authenticity of the instrument by acts which amount to an estoppel.

(*p*) *In re Rice*, 32 Ch. D. 35.
(*q*) *In re Reay's Estate*, 1 Jur. (N.S.) 222.
(*r*) *Worthington* v. *Moore*, 64 L. T. 338.
(*s*) *Poole* v. *Warren*, 8 A. & E. 588.
(*t*) *Pearce* v. *Hooper*, 3 Taunt. 60; Cockle, 335.

Where an instrument requires to be attested by several witnesses, it may be proved by calling any one of them (*u*), except in the case of wills, which, under certain circumstances, can be proved only by the production of all the producible witnesses (*x*). An instrument which is required to be attested by several witnesses may be proved by evidence of the handwriting of one of such witnesses, coupled with proof of his identity, as soon as the absence of all the witnesses has been explained satisfactorily, but not otherwise (*y*).

To prove a will of land against the heir, all the witnesses must be called (*z*), unless one of them is dead, or abroad, or insane, or has not been heard of for many years, when his evidence will be dispensed with, or unless the heir admits it, when the Court will establish it without declaring it to be well proved; but where the action is by the heir against the devisee, the latter is not required to produce all the witnesses (*a*).

In all other cases, to prove a will it is sufficient to call one of the witnesses who can speak to the attestation (*b*), and who can testify either that he saw the testator sign, or that he heard him acknowledge to the witness, or in his presence, that the will was his (*c*). The witnesses must also have subscribed either actually in the presence of the testator, or so near to him that, although he did not see them sign, he might have seen them without moving from where he was. "It is enough if the testator might see, it is not necessary that he should actually see them signing; for at that rate if a man should turn his back or look off, it would vitiate the will." Thus, where the witnesses were in one room, and the testator in another; and the latter, although he did

(*u*) *Holdfast* v. *Dowsing*, 2 Str. 1253.
(*x*) *Coles* v. *Coles*, L. R. 1 P. & D. 70; *Belbin* v. *Skeats*, 1 Sw. & Tr. 148.
(*y*) *Nelson* v. *Whittall*, 1 B. & Ald. 19; *Adam* v. *Kerr*, 1 Bos. & P. 360.
(*z*) *Bootle* v. *Blundell*, 19 Ves. 494.
(*a*) *Tatham* v. *Wright*, 2 Russ. & M. 1.
(*b*) Bull. N. P. 264.
(*c*) *Stonehouse* v. *Evelyn*, 3 P. Wms. 113.

not see them sign, might have seen them through a window, the will was held good (*d*); but it will be otherwise if the testator could not have seen them without changing his position (*e*), or was insensible at the time (*f*). To obtain probate of a will it is of course necessary to call one of the attesting witnesses (*g*), although it is not necessary to call both (*h*); but if one is called and fails to prove the execution, the other must be called, if possible, although he may be known to be adverse to the party producing him (*i*); and if a witness to the will gives evidence against it, he may be contradicted by other evidence, or it may be shown that he has an adverse interest, and then he can be cross-examined as a hostile witness (*k*). When the attesting witness to the will (the attestation clause being insufficient) refuses to make an affidavit as provided for by rule 4 of the Probate Rules, 1862, the Court, under s. 24 of the Probate Act, 1857, may order that such witness be examined in open court (*l*). When probate of a will had been granted on the evidence of the two attesting witnesses, such probate was confirmed in subsequent proceedings although one of the witnesses testified against the will and the other was not called, the Court being of opinion that the one witness had been tampered with, and good reasons were given for not calling the other (*m*). Where all the witnesses swear the will was not duly executed, other evidence is admissible to support it (*n*).

Where a witness, called to prove the execution of an instrument, sees his signature to the attestation, and says that he is therefore sure that he saw the party

(*d*) *Shires* v. *Glascock*, 2 Salk. 688; *Casson* v. *Dale*, 1 Bro. Ch. 99.
(*e*) *Doe* v. *Manifold*, 1 M. & S. 294.
(*f*) *Right* v. *Price*, Doug. 241.
(*g*) *Bowman* v. *Hodgson*, L. R. 1 P. & D. 362.
(*h*) *Belbin* v. *Skeats*, 1 Sw. & Tr. 148.
(*i*) *Coles* v. *Coles*, L. R. 1 P. & D. 70.
(*k*) *Ibid.*
(*l*) *In the Goods of Sweet*, [1891] P. 400.
(*m*) *Pilkington* v. *Gray*, [1899] A. C. 401.
(*n*) See *Wright* v. *Rogers*, L. R. 1 P. & D. 678.

execute the deed, that is a sufficient proof of the execution of the instrument, though the witness adds that he has no recollection of the fact (*o*).

Where an attesting witness has become blind, he must still be called to give evidence from recollection (*p*). If the attesting witness be called, and can recollect nothing, then the execution of the deed may be proved in any other manner available (*q*).

III. *Documents Thirty Years Old.*

In the case, however, of a document which is thirty years old, much less strictness is required. If a document bears a date, it will be presumed that it was signed or executed on that date (*r*); if it is undated, its date can be proved by oral evidence; and, even if it bears a date, oral evidence is admissible to show that it was signed or executed on some other date. Next, the party who tenders it must prove that the document is produced from a proper custody. For this purpose he must as a rule call a witness to show from what custody it has come (*s*). If a document thirty years old or more be produced from a proper custody, it will be presumed to have been signed or written by the person whose signature it bears or in whose writing it purports to be, and to have been duly executed and attested, if it purports so to be. No proof of any of these facts is required. The admissibility of such a document without such proof depends

(*o*) *Per* BAYLEY, J., in *Maugham* v. *Hubbard*, 8 B. & C. at p. 16; Cockle, 266; cf. *Burling* v. *Pattison*, 9 C. & P. 579.
(*p*) *Rees* v. *Williams*, 1 De G. & Sm. 314.
(*q*) *Talbot* v. *Hodson*, 7 Taunt. 251.
(*r*) *Anderson* v. *Weston*, 6 Bing. N. C. 296; Cockle, 332.
(*s*) *Evans* v. *Rees*, 10 A. & E. 154.

upon the custody from which it is produced. It must be a custody which is some guarantee of its genuineness, but need not be that in which the law would in strictness require it to be, so long as the document may be naturally or reasonably expected to be found in such custody (*t*). The judge in each case decides whether the custody is proper.

This rule has been made for the sake both of convenience and of necessity; as it is most difficult at times, and occasionally even impossible, to prove the due execution of ancient documents. The genuineness of the document is guaranteed by the custody from which it is produced. And it is not necessary that it should be produced from the custody which is strictly proper; it is sufficient if the custody be one which may be reasonably and naturally explained (*u*) and one which affords reasonable assurance of the authenticity of the document (*x*).

In the case of *Bishop of Meath* v. *Marquis of Winchester* (*y*), TINDAL, C.J., said:

"These documents were found in a place in which, and under the care of persons with whom, papers of Bishop Dopping might naturally and reasonably be expected to be found, and that is precisely the custody which gives authenticity to documents found within it; for it is not necessary that they should be found in the best and most proper place of deposit. If documents continued in such custody, there never would be any question as to their authenticity; but it is when documents are found in other than the proper place of deposit, that the investigation commences, whether it was reasonable and natural, under the circumstances in the particular case, to expect that they should have been in the place where they are actually found; for it is obvious that whilst there can be only one place of deposit strictly and absolutely proper, there may be various and many that are reasonable and probable, though differing in degree, some being more so, some less; and

(*t*) *Meath* v. *Winchester*, 3 Bing. N. C. 183; Cockle, 333.
(*u*) *Doe* v. *Samples*, 8 A. & E. 154.
(*x*) *Per* COLERIDGE, J., in *Doe* v. *Phillips*, 8 Q. B. 158; cf. *Bidder* v. *Bridges*, 54 L. T. 529; and *R.* v. *Norfolk County Council*, 26 T. L. R. 269.
(*y*) 3 Bing. N. C., at p. 200.

in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for, that it impresses the mind with the conviction, that the instrument found in such custody must be genuine. That such is the character and description of the custody, which is held sufficiently genuine to render a document admissible, appears from all the cases. On the one hand, old grants to abbeys have been rejected as evidence of private rights, where the possession of them has appeared altogether unconnected with the persons who had any interest in the estate. Thus, a manuscript found in the Heralds' Office, enumerating the possessions of the dissolved monastery of Tutbury, a manuscript found in the Bodleian Library, Oxford, and a grant to a priory brought from the Cottonian MSS. in the British Museum, were all held to be inadmissible, the possession of the documents being unconnected with the interests in the property. On the other hand, an old chartulary of the dissolved abbey of Glastonbury was held to be admissible because found in the possession of the owner of part of the abbey lands, though not of the principal proprietor. This was not the proper custody, which, as Lord REDESDALE observed, would have been the Augmentation Office; and, as between the different proprietors of the abbey lands, it might have been more reasonably expected to have been deposited with the largest; but it was, as the Court argued, a place of custody where it might be reasonably expected to be found."

Accordingly in this case it was decided that though a document relating to a see ought strictly to be in the custody of the present bishop, yet if the son or executor of the late bishop produce it, it will be admitted. So an expired lease may be produced from the custody either of the lessor or the lessee: as it is an accident whether or not the tenant will deliver it up at the end of the term. The same doctrine applies to family Bibles. A New Testament containing entries of the births, deaths and marriages of a family, produced by a member thereof, and proved to have been in the possession of the family for a long time, is admissible in evidence without proof of handwriting (*z*). But it is not sufficient to produce an ancient grant to a priory from the British Museum merely, without showing that someone having a right to possession of it (as owning the property, etc.) lodged it there (*a*).

So a will which is thirty years old "proves itself" if

(*z*) *Hubbard* v. *Lees*, L. R. 1 Ex. 255.
(*a*) *Bidder* v. *Bridges*, 54 L. T. 529.

it be produced from the proper custody (*b*). It is not necessary to call any of the attesting witnesses, although they appear to be living (*c*). This is so even though there are circumstances which might lead to the inference that the will had been cancelled (*d*). The thirty years are computed from the date of the will (*e*).

Moreover, ancient documents, which purport to be part of the transactions to which they relate as distinct from a mere narrative of them, and which are produced from a proper custody, not only prove themselves, but are received as evidence that those transactions actually occurred. This is so whether the rights in question be public or private, provided the controversy refers to a time so remote that it is unreasonable to expect a higher species of evidence. But the surrounding circumstances must be free from reasonable suspicion ; and the deeds or other documents must be more than thirty years old, and must come from some custody in which they might naturally be found if authentic.

In *Roe* v. *Rawlings* (*f*), a paper was received which purported to be a statement made by a confidential agent, to a former tenant for life, of rent reserved in 1728, and had been endorsed as such by the latter. This document was handed down with other muniments of title to the plaintiff, who was tenant in tail in 1806, and it was then held to be evidence for him to show that the rent reserved by a tenant for life who had immediately preceded the plaintiff, was less than the rent originally reserved. Lord ELLENBOROUGH said :—

(*b*) *Rancliff* v. *Perkins*, 6 Dow, 202.
(*c*) *Doe* v. *Walley*, 8 B. & C. 22.
(*d*) *Andrew* v. *Motley*, 12 C. B. (N.S.) 526.
(*e*) *M'Kenire* v. *Fraser*, 9 Ves. 5.
(*f*) 7 East, 279.

"Ancient deeds, proved to have been found amongst deeds and evidences of land, may be given in evidence, although the execution of them cannot be proved; and the reason given is, 'that it is hard to prove ancient things, and the finding them in such a place is a presumption they were fairly and honestly obtained, and reserved for use, and are free from suspicion of dishonesty.' This paper, therefore, having been found amongst the muniments of the family . . . accredited . . . and preserved . . . we think that it was evidence to be left to the jury of the amount of the ancient rent at the time it bears date."

In ejectment, where both plaintiff and defendant claimed through E., it was held that an ancient entry made by E.'s steward in his rent book was evidence as to the identity of the property (*g*).

In *Malcolmson* v. *O'Dea* (*h*), it was laid down that the true ground for admitting a lease is that it shows an act or acts of ownership. Thus, the production from proper custody of an ancient lease granted by A., is evidence of an act of ownership over the *locus in quo* by A. at that date, and this is presumptive evidence that he was then owner in fee simple of such land (*i*). So, to prove a personal prescriptive right of fishery, as appurtenant to a manor, old licences on the court rolls, granted by the lords of the manor, are admissible (*k*). Old rent rolls or court rolls are received to prove rights to which they refer (*l*). Entries in old parish rate books are admissible as evidence to prove who were the owners or occupiers of the property at a previous time (*m*).

It is said, however, to be an established principle, that nothing said or done by a person, having at the time an interest in the subject-matter, shall be evidence either for him or persons claiming under him (*n*); and therefore in a settlement case (*o*), an old entry in a parochial

(*g*) *Doe* v. *Seaton*, 2 A. & E. 171; and see *Pearson* v. *Beck*, 8 Ex. 452.
(*h*) 10 H. L. Cas. 593; followed in *Blandy-Jenkins* v. *Earl of Dunraven*, [1899] 2 Ch. 121; and see *Doe* v. *Pulman*, 3 Q. B. 622.
(*i*) *Clarkson* v. *Woodhouse*, 3 Doug. 189; see *ante*, p. 107.
(*k*) *Rogers* v. *Allen*, 1 Camp. 309; *Malcolmson* v. *O'Dea*, *supra*.
(*l*) *Heath* v. *Deane*, [1905] 2 Ch. 86.
(*m*) *Smith* v. *Andrews*, [1891] 2 Ch. 678.
(*n*) *Per* ABBOTT, C.J., in *R.* v. *Debenham*, 2 B. & Ald. at p. 187.
(*o*) *Ibid.*

book was held not to be evidence of the terms under which a pauper resided in the parish. So, entries made by a deceased person, through whom the defendant claims, acknowledging the receipt of rent for the premises in question, are not evidence of title for the defendant (*p*).

PRIVILEGE OF DOCUMENTS WHEN PRODUCED AT THE TRIAL.

So far it has been assumed that the party who desires to put a document in evidence is in possession of it. It often happens, however, that the document on which he relies is in the possession of his opponent. In that case he must give his opponent notice to produce it (*q*). But even though he may thus secure that the document shall be in court on the day of trial, nevertheless his opponent may object to its being read to the jury on one or more of the following grounds :—

(i.) That the document is wholly irrelevant to any issue in the proceedings.

(ii.) That the document is a communication which passed between the objector and his solicitor, or came into existence for the use of his solicitor to enable him to conduct the case or advise the objector thereon.

(iii.) That the production of the document will tend to criminate him.

(iv.) That the document is a communication which passed between the objector and his wife (or her husband).

(*p*) *Outram* v. *Morewood*, 5 T. R. 123.

(*q*) As to the value and effect of a notice to produce, see *post*, p. 589.

(v.) That the document tendered in evidence was written "without prejudice," or is an answer to a document which was written "without prejudice."

Again, it may be that the document on which a party relies is in the possession of some third person. If so, this third person should be served with a *subpœna duces tecum* (*r*)—that is, a summons bidding him bring certain specified documents into Court with him. The third person must obey the *subpœna* and produce the document when called upon so to do. But he can still object to its being read aloud in open Court on any of the grounds numbered (i.), (iii.) and (iv.), and perhaps also (v.), above.

Moreover, if the head of any Government department be called upon to produce any official document, he can state that in his opinion it would be prejudicial to the public interests that the document should be read aloud in open Court; and thereupon the judge will permit him to withhold it from publication (*s*). In all other cases it is for the judge to decide as to the validity of any objection to produce a document, whether made by a party or by a witness; and his decision on the point is final.

If one party has given the other notice to produce at the trial a document in his possession which that other succeeds in proving to be privileged from production, the first party may put in a copy of that document if he has one, or prove its contents by any other secondary evidence. But this rule does not apply when the document is privileged from production on the ground of public

(*r*) As to this *subpœna*, see *post*, p. 572.
(*s*) See *ante*, pp. 209, 233.

policy (*t*), nor, it is submitted, when it is written "without prejudice."

(i.) It is unnecessary to say anything as to the first objection; irrelevant matter will of course be excluded.

(ii.) In this case the privilege arises out of the professional relation which exists between a solicitor and his client (*u*).

Letters containing mere statements of fact are not privileged, unless they are of a professional and confidential character (*x*). In *Lowden* v. *Blakey* (*y*) an advertisement submitted to counsel was held privileged. But a man cannot claim privilege for a deed simply on the ground that the solicitor obtained it from him in the course of litigation (*z*).

The litigation, contemplated or threatened, must be some specific litigation (*a*). Thus, where a solicitor, having been consulted in a matter as to which no dispute had arisen, applied to a surveyor for certain information to enable him to advise, it was held that the information was not privileged (*b*). But such litigation need not be with the particular adversary against whom the privilege is raised; and a document, privileged in one action, will be privileged in any subsequent action, whether the parties or issues are the same or not. So a written opinion given in a friendly way by an ex-Lord Chancellor to a friend has been held not to be privileged (*c*).

The privilege has been extended to communications between a client in Scotland and a Scotch solicitor practising in London (*d*); and the opinion of a Dutch lawyer, obtained by the defendants in an action with reference

(*t*) See *ante*, p. 233.
(*u*) *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644; *Collins* v. *L. G. O. Co.*, 63 L. J. Q. B. 428; *O'Rourke* v. *Darbishire*, [1920] A. C. 581; and *post*, p. 555.
(*x*) *Per* KAY, L.J., in *O'Shea* v. *Wood*, [1891] P. 286.
(*y*) 23 Q. B. D. 332.
(*z*) *Per* Lord BLACKBURN, in *Lyell* v. *Kennedy*, 9 App. Cas., at p. 88.
(*a*) *Westinghouse* v. *Midland Rail. Co.*, 48 L. T. 462.
(*b*) *Wheeler* v. *Le Marchant*, 17 Ch. D. 675.
(*c*) *Smith* v. *Daniell*, L. R. 18 Eq. 649.
(*d*) *Lawrence* v. *Campbell*, 4 Drew. 485.

to their defence, has been held privileged (*e*). When a solicitor writes letters to a third party for the purposes of a suit, the answers are privileged (*f*); and letters passing between a country solicitor and his town agent are privileged (*g*). In an action by the payee of a promissory note against the maker, it appeared that the plaintiff had acted as attorney to the defendant, and, while holding that capacity, had obtained documentary evidence from the defendant, which he stated was wanted to assist her in preparing a case for counsel; and on this he relied to take the note out of the Statute of Limitations. It was held that the evidence was inadmissible for the plaintiff (*h*).

If a solicitor improperly hands a document to a third party, the latter may give it in evidence (*i*). Where the effect of an opinion of counsel was set out in a statement of claim, it was held that the plaintiff must produce it for the inspection of the defendant (*k*), or be precluded from giving it in evidence at the trial. And if an opinion of counsel, or, indeed, any other privileged document, is made an exhibit to an affidavit, anyone entitled to see the affidavit is also entitled to see such opinion or other document (*l*), unless it is a document which comes into existence solely for the information of the Court (*m*).

A solicitor, who has been subpœnaed to produce a document which he holds for a client, may, in his discretion, refuse to produce it or to answer any question as to its contents; and the judge ought not to examine it to ascertain whether it ought to be withheld (*n*).

(iii.) The objection that the production of a document will tend to criminate the objector must be taken on

(*e*) *Banbury* v. *Banbury*, 2 Beav. 177.
(*f*) *Simpson* v. *Barnes*, 33 Beav. 483.
(*g*) *Catt* v. *Tourle*, 19 W. R. 56.
(*h*) *Cleave* v. *Jones*, 21 L. J. Ex., at p. 108.
(*i*) *Per* PARKE, B., in *Cleave* v. *Jones*, 21 L. J. Ex., at p. 106.
(*k*) *Mayor of Bristol* v. *Cox*, 26 Ch. D. 678.
(*l*) *In re Hinchliffe*, [1895] 1 Ch. 117.
(*m*) *Sloane* v. *Britain Steamship Co.*, [1897] 1 Q. B. 185; and see *R.* v. *Godstone R. D. C.*, [1911] 2 K. B. 465.
(*n*) *Volent* v. *Soyer*, 13 C. B. 231.

oath (*o*). That it will expose him to a civil action is not sufficient (*p*). Claims of privilege on this ground have been already fully discussed under the head of "Privilege of Witnesses" (*q*).

(iv.) Neither husband nor wife can be compelled to disclose any document which has passed between them. Such communications are "held sacred" on grounds of "social policy" (*r*). And after the death of either, the privilege enures for the benefit of the survivor (*s*). This rule was expressly preserved as to civil cases by the Evidence Amendment Act, 1853 (*t*), and as to criminal cases by the Criminal Evidence Act, 1898 (*u*).

(v.) "Without prejudice." As we have seen (*x*), whatever a party to an action says with regard to the matters in issue in that action is relevant, and therefore admissible in evidence against him. But it would be manifestly unfair and hurtful to the public interests if it were impossible for parties to a dispute, whether an action is actually pending or not, to enter into negotiations with a view to compromise, without running the risk of having their letters given in evidence against them if the negotiations fail and the action proceed to trial. Accordingly, the law has laid down the rule (*y*) that after a dispute has arisen, a party may, if he chooses, guard himself against his statements, or those of his agents, being made a weapon against him afterwards—that is, as it is usually termed, he can intimate to the other party that all communications with him are to be "without prejudice." But he must do so clearly and distinctly or the general rule will still apply (*z*).

(*o*) *Per* JESSEL, M.R., in *Webb* v. *East*, 5 Ex. D. at p. 112.
(*p*) *Tetley* v. *Easton*, 18 C. B. 643.
(*q*) See *ante*, p. 192.
(*r*) *Per* MANISTY, J., in *Wennhak* v. *Morgan*, 20 Q. B. D. at p. 639.
(*s*) *O'Connor* v. *Marjoribanks*, 4 Man. & G. 435.
(*t*) 16 & 17 Vict. c. 83, s. 3, *ante*, pp. 182, 183, 200.
(*u*) 61 & 62 Vict. c. 36, s. 1 (d), *ante*, pp. 182, 201.
(*x*) See *ante*, p. 92.
(*y*) *Walker* v. *Wilsher*, 23 Q. B. D. 335.
(*z*) *Wallace* v. *Small*, M. & M. 446; but see *Waldridge* v. *Kennison*, 1 Esp. 142.

Thus, if a correspondence be opened between the parties, a letter written "without prejudice" prevents its being read at the trial (*a*); it prevents also the reply to it (*b*), and, indeed, all the rest of the correspondence (*c*) being read. The same rule applies to conversations, and accordingly no evidence can be given of such a conversation, unless a break be clearly shown to have occurred which separates the matter sought to be proved from the part of the conversation which is clearly "without prejudice" (*d*).

A statement made "without prejudice" cannot be given in evidence at the trial for any purpose without the consent of both parties, and consequently the judge is not entitled to look at letters so protected for the purpose of deciding the issue as to costs (*e*). He may, of course, look at them to see if they are in fact marked "without prejudice" (*f*). But an incidental admission made in the course of the negotiations but having nothing to do with their subject may be proved (*g*); and, of course, if a settlement is arrived at, the statement can be put in if disputes or litigation subsequently occur as to the terms of the settlement itself (*h*); but it would seem that it cannot be made use of in order to prevent time running under the Statutes of Limitation (*i*).

The rule only applies in disputes between private individuals. Thus, a notice of intention to suspend payment of debts, which is an act of bankruptcy, may be proved by any creditor, even if headed "without prejudice," for not only is there no dispute, but the interests of the creditor will suffer if he does not avail

(*a*) *Paddock* v. *Forrester*, 3 Man. & G. 903.
(*b*) *In re Harris*, 44 L. J. Bkcy. 33.
(*c*) *Paddock* v. *Forrester*, *supra*; *Walker* v. *Wilsher*, *supra*.
(*d*) *Thomson* v. *Austen*, 2 Dowl. & Ry. 361.
(*e*) *Walker* v. *Wilsher*, 23 Q. B. D. 337.
(*f*) *In re Daintrey*, [1893] 2 Q. B. 116.
(*g*) *Waldridge* v. *Kennison*, 1 Esp. 142.
(*h*) *In re River Steamer Co.*, L. R. 6 Ch. 822; *Holdsworth* v. *Dimsdale*, 19 W. R. 798.
(*i*) See *per* MELLISH, L.J., *In re River Steamer Co.*, *supra*.

himself of the act of bankruptcy, which he must prove (*k*). And, as an agreement between the prosecutor and a person accused of a felony is a criminal offence, the rule cannot apply to charges of felony, and probably does not apply to other criminal charges. It may, however, be that, in the case of a misdemeanour of the class which the parties are allowed to compromise (*l*), negotiations entered into "without prejudice" are privileged.

STAMP OBJECTIONS.

Even though a document has been strictly proved and all objections to its production, whether proceeding from a party or from the witness producing it, have been overruled, still, in a civil case, it sometimes happens that the officer of the court may object to its being read on the ground that it is insufficiently stamped, or, worse still, that it is not stamped at all. The judge will decide whether the document requires a stamp, and if so, for what amount; he must decide this before the document can be read to the jury, and his decision on the point is final (*m*). No new trial can be granted on this ground. The objection can usually be removed by payment of the amount of the stamp required by law, together with a penalty of £10 and a fee to the officer who takes the objection, and where the unpaid duty exceeds £10, interest at the rate of 5 per cent. per annum upon the amount of the unpaid duty must also be paid (*n*). But in some cases the objection is fatal; a bill of exchange, for instance, cannot be stamped after it has been issued.

(*k*) *In re Daintrey, supra.*
(*l*) Such as a simple assault.
(*m*) Order XXXIX., r. 8.
(*n*) The Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 14, 15 (1).

No stamp objection can be taken in a criminal case.

It is impossible in a book on the Law of Evidence to give even a brief outline of the law relating to stamps. For this we must refer the reader to the Stamp Act, 1891, which consolidates the previous enactments on the subject. We can here merely state the leading principles, so far as they affect the admissibility in evidence of written documents.

The general rule is, that no instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall (except in criminal proceedings) be pleaded or given in evidence, unless it is duly stamped in accordance with the law in force at the time when it was first executed.

It is the duty of the officer of the Court, and not of counsel, to take the objection that any document is not stamped, or is insufficiently stamped. If, however, the document bears a stamp denoting that, in the opinion of the Commissioners of Inland Revenue, it either is not chargeable with any duty, or is duly stamped, no objection to it can be raised (*o*).

If a document is not a completed agreement but only an offer, it does not require a stamp; but when it amounts to an agreement, or is evidence of one, it must be stamped, if the subject-matter is above £5 (*p*). If a document exists, which either party alleges to be the agreement between the parties, the original must be produced, and if it prove to be not properly stamped it will be inadmissible (*q*). Such an agreement cannot be treated as a nullity, if it is produced and appears to be unstamped; and therefore it was held in *Delay* v.

(*o*) Stamp Act, 1891, s. 12.
(*p*) Cf. *Hegarty* v. *Milne*, 14 C. B. 627.
(*q*) *Buxton* v. *Cornish*, 12 M. & W. 426.

Alcock (*r*), that a County Court judge was wrong in allowing parol evidence to be given of an agreement contained in an unstamped writing. Where, however, a party succeeds in establishing his case by oral evidence, the opposite party cannot defeat it by merely producing an unstamped written agreement. Thus, in *Magnay* v. *Knight* (*s*), where the plaintiff closed her case without anything appearing to show that there was a written agreement between her and the defendant as to the subject-matter of the action, the defendant was held not entitled to call for a nonsuit by producing a paper purporting to be an agreement, but unstamped.

When it is necessary to produce a writing, or to account for its absence, secondary evidence will not be received if it appears that the original required a stamp, and that it was unstamped (*t*); but a writing requiring a stamp will be presumed to have been properly stamped (*u*); and, as against a party refusing to produce a document after notice, there is a similar presumption (*x*); but such a presumption may be rebutted by evidence that the writing was not stamped and then no copy can be put in (*y*). If it is shown that a lost document was at one time unstamped, this fact alone will raise a presumption that it continued without a stamp (*z*). The Court will not sanction an agreement to waive the objection for want of a stamp (*a*).

When an instrument purports to have been stamped, but no stamp appears, or one partially effaced, the judge may receive the writing, if the want of the stamp or its erasure is satisfactorily explained to him (*b*). Where an instrument, so far as appears on the face of it, is properly

(*r*) 4 E. & B. 660.
(*s*) 1 Man. & G. 944; and see *Mason* v. *Motor Traction Co.*, [1905] 1 Ch. at p. 423.
(*t*) *Supra.*
(*u*) *Hart* v. *Hart*, 1 Hare, 1; cf. *Pooley* v. *Goodwin*, 4 A. & E. 94.
(*x*) *Crisp* v. *Anderson*, 1 Stark. 35.
(*y*) *Crowther* v. *Solomons*, 6 C. B. 758.
(*z*) *Marine Investment Co.* v. *Haviside*, L. R. 5 H. L. 624.
(*a*) *Owen* v. *Thomas*, 3 Myl. & K. 353; and see *post*, p. 259.
(*b*) *Doe* v. *Coombs*, 3 Q. B. 687.

stamped, the Court is entitled to look outside the instrument in order to settle whether it is properly stamped or not (*c*); except, of course, when it bears a denoting stamp under s. 12 of the Stamp Act, 1891.

An unstamped instrument, inadmissible as an agreement, may yet be admissible for some other purpose, *e.g.*, to prove a collateral or independent fact. Thus, a cheque, drawn for a greater amount than the law then permitted having regard to the stamp which it bore, has been received to prove the receipt of money by a holder, but not to discharge the banker (*d*); an unstamped receipt to show that goods were sold to a third person, and not to the defendant (*e*); an unstamped agreement to show an illegal consideration for a debt (*f*); but it cannot be presented to a jury as evidence of any part of the substantial claim of a party (*g*). An unstamped document may be handed to a witness to refresh his memory, or to challenge it (*h*); and a document, which requires a stamp for some purposes but not for others, will be admissible for such latter purposes, but for them only. Where a document is void as a receipt for want of a proper stamp, it may nevertheless be admissible as evidence of an account stated, or other outstanding accounts (*i*), or of a contract (*k*). An unstamped or unregistered assignment of a debtor's whole property may be given in evidence as an act of bankruptcy, although until stamped it cannot be received for the purpose of giving it effect or supporting any claim under it (*l*). A 10*s.* deed stamp on a mortgage is, however, insufficient to render it admissible as a deed for the purpose of showing that it passed the legal estate

(*c*) *Maynard* v. *Consolidated Kent Collieries Corporation*, [1903] 2 K. B. 121.
(*d*) *Blair* v. *Bromley*, 11 Jur. 617.
(*e*) *Miller* v. *Dent*, 10 Q. B. 846.
(*f*) *Coppock* v. *Bower*, 4 M. & W. 361.
(*g*) *Jardine* v. *Payne*, 1 B. & Ad. 670.
(*h*) *Birchall* v. *Bullough*, [1896] 1 Q. B. 325.
(*i*) *Matheson* v. *Ross*, 2 H. L. Cas. 301.
(*k*) *Evans* v. *Prothero*, 1 De G. M. & G. 572.
(*l*) *Ex parte Squire*, L. R. 4 Ch. 47.

in the mortgaged property (*m*); and a promissory note insufficiently stamped with a penny receipt stamp cannot be given in evidence to prove the receipt of the money for which it is given (*n*).

When an instrument is inadmissible by reason of the stamp laws, the plaintiff may still recover on another cause of action, of which the instrument does not form a necessary part, *e.g.*, for money lent, using the promissory note as an acknowledgment of the debt (*o*); and when a receipt is unstamped, payment may be proved by oral evidence (*p*).

Alteration of a Stamped Document.

A material alteration in a writing requiring a stamp, after it has been made or executed, avoids the stamp, and renders a fresh stamp necessary; but it is otherwise if the alteration is immaterial, or according to the original intent of the parties (*q*). Thus, when the defect is unintentional, and the alteration makes the writing merely what it was intended originally to have been, it will not require to be restamped (*r*). Where a promissory note was made originally payable to the plaintiff, who complained that it ought to have been payable to order, it was held that, as between the parties to the note, the interlineation of the words, "or to order," did not render a new stamp necessary (*s*). So, when a bill is altered by the consent of parties before the bill has been issued, it will not require to be restamped; but when the bill has been issued, and the alteration is material and varies the essential character of the writing, so as to amount to a new contract, a

(*m*) *Whiting to Loomes*, 17 Ch. D. 10.
(*n*) *Ashling* v. *Boon*, [1891] 1 Ch. 568.
(*o*) *Farr* v. *Price*, 1 East, 56.
(*p*) *Rambert* v. *Cohen*, 4 Esp. 213.
(*q*) *Master* v. *Miller*, 1 Sm. L. C. 803.
(*r*) *Ccle* v. *Parkin*, 12 East, 471.
(*s*) *Byrom* v. *Thompson*, 11 A. & E. 31.

new stamp will be required, notwithstanding the consent of the parties to the alteration (*t*).

Time of Objecting to the Want of Stamp.

Where an objection is raised to an instrument for want of a stamp, the objection should be taken as soon as the instrument is tendered, and before it is received in evidence. If the instrument is received, and read without objection, it cannot afterwards be objected to for want of a stamp (*u*). It is doubtful whether a judge has not at least a discretionary power to reject a document which, after being put in, subsequently appears to be unstamped, or insufficiently stamped (*x*). Where a judge ruled that a document is inadmissible on account of the insufficiency of the stamp, it was formerly held that his decision was open to review (*y*); but by Order XXXIX., r. 8, of the R. S. C., 1883, it is provided that "a new trial shall not be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp." No appeal lies to the Court of Appeal from a similar ruling by the judge trying an action without a jury (*z*); nor is there any appeal to the High Court from the ruling of a County Court judge that a document tendered in evidence is sufficiently stamped (*a*).

Thus, where on the hearing of certain motions, which were acceded to by the Court, an undertaking was given at the Bar by counsel for the respondents, on the instructions of their solicitors, that unstamped documents tendered in evidence on behalf of the respondents should be duly stamped, and this undertaking was

(*t*) *Bowman* v. *Nicholl*, 5 T. R. 537.
(*u*) *Robinson* v. *Lord Vernon*, 7 C. B. (N.S.) 235.
(*x*) *Field* v. *Woods*, 7 A. & E. 114.
(*y*) *Sharples* v. *Rickard*, 2 H. & N. 57.
(*z*) *Blewitt* v. *Tritton*, [1892] 2 Q. B. 327.
(*a*) *Mander* v. *Ridgway*, [1898] 1 Q. B. 501; *Lowe* v. *Dorling*, 74 L. J. K. B. 794.

not fulfilled, the Court directed the order made on the motions to be drawn up without entering the unstamped documents, and made a four-day order on the solicitors to produce the documents to the registrar duly stamped (*b*).

(*b*) *In re Coolgardie Goldfields, Ltd.*, [1900] 1 Ch. 475.

CHAPTER VIII.

Secondary Oral Evidence.

(hearsay.)

We have defined Primary Evidence as that which its own production shows to be the best obtainable, and Secondary Evidence as that which on its production discloses the fact that there is or once was evidence in existence superior to itself. In other words, secondary evidence does not pretend to be original; it confesses that it is not the best evidence conceivable. But in certain circumstances it is admitted either for the sake of convenience, or for reasons of public policy, or because it is the best evidence obtainable.

It is a rule of law that the best evidence must be given. Or, in other words, the law requires the production of that evidence which is the best attainable of its class. The meaning of the rule is this, that the evidence tendered will not be received when it shows on the face of it, or when other circumstances admitted or proved show, that there is better evidence behind. Evidence obviously inferior will not be admitted, when evidence of a better and more original nature can be produced. The original document itself is clearly the best and primary evidence of its contents. The copy is secondary, and however indisputably it may be authenticated,

it is inadmissible in evidence if the original could be produced, unless its production is dispensed with by some statute or excused by the practice of the Court.

Secondary evidence may be either oral or documentary. Thus a deposition or any other report, spoken or written, of what a witness said in the box, is secondary oral evidence; while the copy of a letter or someone's verbal account of his recollection of its contents will be secondary documentary evidence. There is, however, a great difference in the rules which regulate the admissibility of secondary oral and secondary documentary evidence. In the case of secondary documentary evidence as soon as it is established that the original is lost or destroyed a copy can, as a rule, be proved; but it is not so with secondary oral evidence. The fact that a witness is not in court, that he is ill, insane, dead, or out of the jurisdiction, does not of itself make secondary oral evidence admissible. Merely accounting for the absence of a witness does not entitle either party to put in a report or draft of what he would probably say, if he were present; the witness must come into court and be examined and cross-examined on his oath.

Our Courts then admit secondary evidence of the contents of a document more readily than secondary evidence of an oral statement. This is because a document cannot change and cannot be cross-examined; hence an accurate copy of a document is almost as valuable as the original. But a witness will often say less, and can often be made to say more, than is written down in any statement of his evidence. Cross-examination will often effect important variations or disclose weak points in his evidence. It is therefore unfair to the opponent that the witness should not be cross-examined in the hearing of the jury which has to decide the issue. Hence, as a general rule, if a witness be not forthcoming when he is called to enter the box, the party calling him must do without his evidence.

Secondary evidence of any oral statement is usually called hearsay. According to its literal meaning the word "hearsay" should be confined to oral evidence reported orally—but it is now used to cover all oral evidence reported, whether orally or in writing, and also any written statement in which a man, who is not called before the Court as a witness, narrates what he saw or heard.

The repetition by a witness of that which he was told by someone else who is not called as a witness is hearsay, and is therefore, as a general rule, inadmissible. A. cannot be called to state what he heard B. say. B. must be called to tell the Court himself what he knows about the matters in issue.

Where, however, the issue before the Court is, What did A. say?—as it is in an action of slander—there is no objection to a party calling witness after witness to prove what A. said; for this, then, is direct primary oral evidence of the fact in issue in the action. But if it is sought to establish that what A. said is true, then proof that A. said it is *primâ facie* inadmissible. If A. seeks to prove that B. is a thief, he cannot prove this by bringing all the world to say that they have been told so; what he has to prove is that B. *is* a thief. So a material admission by a party can always be proved; an admission is not hearsay (*a*).

Every statement, then, is "hearsay" if it is in fact the statement of a third person who is not produced in Court. What a person states of his own knowledge is original evidence, but when he repeats, either verbally or in writing, what another person has told him, this is

(*a*) See *post*, p. 363.

second-hand evidence. And, as a general rule, second-hand evidence is inadmissible.

The reasons for this rule are obvious. We can generally trust a witness who states something which he himself has either seen or heard; but when he tells us something which he has heard from another person, his statement is obviously less reliable and satisfactory. A multitude of probable contingencies diminish its value. The witness may have misunderstood or imperfectly remembered, or even may be wilfully misrepresenting the words of the third person; or the latter may have spoken hastily, inaccurately, or even falsely. Moreover, the person who is really responsible for the statement did not make it on oath (*b*); he was not cross-examined upon it, and the Court had no opportunity of observing his demeanour when he made it. It is a fundamental principle of our law that evidence has no claim to credibility unless it be given on oath, or what is equivalent to an oath, and unless the party to be affected by it has an opportunity of cross-examining the witness (*c*).

To the rule that hearsay is inadmissible there are many exceptions, for each of which good reason can be assigned. The following classes of hearsay evidence were always admissible at the common law:—

(i.) Declarations (*d*) against interest.
(ii.) Declarations made in the course of duty.
(iii.) Evidence in a former proceeding.
(iv.) Depositions.
(v.) Declarations as to public and general rights.
(vi.) Declarations in pedigree cases.

(*b*) Even if the statement were made on oath it would equally be inadmissible. The oath must be taken in Court. *R.* v. *Eriswell*, 3 T. R. 707; Cockle, 152.

(*c*) See the remarks of Sir JAMES MANSFIELD, C.J., in *The Berkeley Peerage Case*, 4 Camp. at p. 414.

(*d*) The word "declaration" includes both oral and written statements.

(vii.) Declarations by a patient as to his symptoms.

(viii.) A dying declaration is also hearsay; yet those who heard it are allowed in certain cases to state to the Court at the trial of an indictment for murder or manslaughter what the dying person said as to the cause of death. This matter has been discussed in an earlier chapter under the head of "Relevancy" (*e*).

Ancient grants, leases, charters, etc., are also sometimes classed as hearsay, because they are often accepted as evidence of the facts which they record. But we have dealt with them in the chapter on "Private Documents" (*f*).

DECLARATIONS AGAINST INTEREST.

A declaration by a person who is still alive, however relevant, is, as a rule, inadmissible; but if he be a party to the action, any statement made by him against his interest can be put in evidence against him as an admission (*g*). But a statement made by a man who is now dead stands on a different footing. He cannot be called as a witness; he cannot be cross-examined; and the fact that the statement made by him told against his interest when he made it is some guarantee of its truth. Hence, any declaration, whether oral or in writing, made by a man who had a competent knowledge of the facts and who is now dead, is freely admitted, either for or against his estate, and

(*e*) See *ante*, p. 70.
(*f*) See *ante*, p. 246.
(*g*) See *post*, pp. 371 *et seq.*

even in favour of third persons in actions in which the representatives or descendants of the dead man have no concern—provided the statement, when made, told against either his pecuniary or his proprietary interest: that is, it must have affected his pocket or his title to some property (*h*). Moreover, when any part of an entry against interest is admissible in evidence, the whole of it is admissible, not merely the words which tell immediately against the interest of the deceased. For instance, if the deceased gave a receipt for money paid to him in discharge of a debt, the whole receipt can be read to the jury, not merely the word "paid" and the amount.

The leading decision on this subject is *Higham* v. *Ridgway* (*i*). In this action it was important to determine the exact date of the birth of the claimant. Evidence was given that the man-midwife, who attended the birth, was dead; and his books, which had been regularly kept, were offered in evidence. They contained an entry in the handwriting of the deceased of the circumstances of the birth, and the date. There was also a charge for attendance, against which the word "paid" was marked. It was held, that the entry was evidence of the time of the birth.

So, in a later case (*k*), evidence was received of entries of charges made by a deceased attorney, who had prepared a lease, to show that the lease was executed at a time later than its apparent date. In this case the charges for preparing the lease seem to have been paid, but this did not appear upon the face of the entries. In the case of

(*h*) *The Sussex Peerage Case*, 11 Cl. & F. 85; *Lloyd* v. *Powell Duffryn Steam Coal Co.*, [1914] A. C. 733.

(*i*) 10 East, 109; 2 Smith, L. C. (12th ed.) 301; cf. *Gleadow* v. *Atkin*, 1 C. & M. 410.

(*k*) *Doe* v. *Robson*, 15 East, 32.

In the Goods of Thomas (*l*), Lord PENZANCE admitted as evidence of the execution of a will an entry made by a deceased solicitor in his ledger admitting payment of his charges for drawing it and attending its execution. A deceased solicitor's books are evidence if he charges himself therein with receipts on his client's behalf, as being against his interest, whether they were made in the ordinary course of his business or not (*m*). In an action (*n*) brought against trustees for negligence in permitting the trust moneys to remain in the hands of C., a member of the firm of solicitors employed in connection with the trust, who had misappropriated them and then died, it was held that the books of the firm were inadmissible, as they were neither the books of the trustees nor the books of C., but of C.'s firm, there being no evidence that C. had written them himself, or that they were made by a clerk under his direction.

It has been held that declarations against pecuniary interest are admissible against third parties, even though the declarant himself received the facts on hearsay (*o*). Thus, "an entry in an attorney's bill of a service of notice on A. B. would be evidence of a service, although, such notice being generally served by an attorney's clerk, the attorney probably had no personal knowledge of such service" (*p*).

But it appears to be otherwise as to declarations against proprietary interest (*q*).

The declarant must be deceased at the time when the evidence is offered. Thus, in an action on a promissory note by an indorsee against the maker the defendant, to prove fraud and the plaintiff's cognizance of it, tendered declarations of the first indorsee, who was alive but was not called. They were rejected on the ground that it is clear that declarations of living third persons, in the

(*l*) 41 L. J. P. & M. 32.
(*m*) *Wills* v. *Palmer*, 53 W. R. 169.
(*n*) *In re Fountaine*, [1909] 2 Ch. 382.
(*o*) *Crease* v. *Barrett*, 1 C. M. & R. 919.
(*p*) *Per* ALDERSON, B., in *Percival* v. *Nanson*, 7 Ex. 1.
(*q*) *Roe* d. *Trimlestown* v. *Kemmis*, 9 Cl. & F. 780.

absence of any community of interest, are not to be received to affect the title or interests of other persons, merely because they are against the interest of those who make them (*r*). Here there was no community or privity of interest between the plaintiff and the absent witness; but if that had existed, the evidence would have been admitted according to the principle laid down by BAYLEY, J., in *Spargo* v. *Brown* (*s*). So it has been held that the entries of a person against his interest are not evidence between third parties, if the declarant be alive, although it appears that he has absconded on a criminal charge, and that it was quite impossible to produce him as a witness (*t*).

An entry by a deceased person against his interest will be good evidence, although it appears that persons are living and are not called, who are acquainted with the fact. Thus, entries by a deceased collector charging himself with the receipt of taxes were received as evidence against a surety that the money had been paid, although the persons who paid it were living and might have been called. An attempt was made in this case to exclude his evidence, because the entries were contained in a private note book, and not a public account book; but the distinction was overruled (*u*). An entry may be from one point of view against the interest of the person who made it, and from another point of view for his interest (*x*).

After the expiration of a long period the death of the declarant will be presumed (*y*), although in other cases it must be proved.

The declaration must be against either the "pecuniary" or the "proprietary" interest of the declarant (*z*);

(*r*) *Phillips* v. *Cole*, 10 A. & E. 111.
(*s*) 9 B. & C. at p. 938, and see *ante*, p. 55; and *Woolway* v. *Rowe*, 1 A. & E. 114; Cockle, 179.
(*t*) *Stephen* v. *Gwenap*, 1 M. & R. 120.
(*u*) *Middleton* v. *Melton*, 10 B. & C. 317.
(*x*) *Newbould* v. *Smith*, 29 Ch. D. 883.
(*y*) *Doe* v. *Michael*, 17 Q. B. 276.
(*z*) *Per* COCKBURN, C.J., in *R.* v. *Birmingham*, 1 B. & S. at p. 768.

no other interest will suffice. This was finally decided in *The Sussex Peerage Case* (*a*), where declarations as to the marriage of Lady Augusta Murray with the Duke of Sussex, made by the deceased clergyman who performed the ceremony, were tendered on the ground that they were declarations of a person who knew the facts, who was not interested in misrepresenting them, and who had an interest in being silent concerning them, because the unlawful celebration of the marriage might have subjected him to a prosecution. All the judges concurred in holding that the declaration must be adverse to some pecuniary interest in the declarant, and that even the fear of a prosecution was not a sufficient interest to let in a declaration as contrary to it (*b*).

It is sufficient if the declaration is *primâ facie* against such interest. But that it was so in fact need not be proved by independent testimony (*c*).

A declaration is said to be against "proprietary" interest when it is made by anyone in possession of land and tends to limit his interest therein to any less estate than a fee simple. Again, where, in order to establish a settlement, it was proved that the pauper's grandfather had occupied a house for four years in the appellant parish, and a book containing certain entries of payment of rent which were proved to be in his handwriting was produced, these entries were admitted in proof of the grandfather's settlement by renting a tenement on the ground that, the four years' occupation being by itself *primâ facie* evidence of a seisin in fee, the proof of payment of rent would cut down the interest to a tenancy, and that therefore the evidence was against proprietary interest (*d*).

Where a deceased tenant, by a written instrument, acknowledged L. as his landlord, this was held to be

(*a*) 11 Cl. & F. 85.
(*b*) And see *Smith* v. *Blakey*, L. R. 2 Q. B. 326; *Massey* v. *Allen*, 13 Ch. D. 558.
(*c*) *Taylor* v. *Witham*, 3 Ch. D. 605; Cockle, 198.
(*d*) *R.* v. *Birmingham*, 1 B. & S. 763; *R.* v. *Exeter*, L. R. 4 Q. B. 341.

evidence of L.'s title as against subsequent tenants who did not claim through the declarant (*e*). In an action of ejectment by A., the declaration by deed of a deceased receiver of rents and profits, that he held under A.'s ancestor, was held evidence against third parties of A.'s title (*f*). A declaration by a deceased occupant, that he managed an estate for a claimant, is evidence of the title of the claimant (*g*). In an action for specific performance of an agreement to take a lease, an entry of a deceased landlord in his own handwriting in his rent book of a promise to grant a lease to a tenant was held admissible in evidence against the tenant as being against the landlord's proprietary interest (*h*).

The declarations of a person in possession of property are admissible, after his decease, to cut down his title, not only as against those claiming under him, but also against strangers (*i*); but declarations of what he heard other persons say are not admissible (*k*). The same document may be proof of possession, and also admissible as a declaration against interest (*l*).

But neither the acts nor the declarations of deceased tenants, although against their interest, are any evidence against the reversioner; for a tenant cannot derogate from the title of his landlord; and, therefore, in a disputed right of common, the plaintiff was not allowed to give evidence of declarations made concerning it by a deceased former tenant of the farm, in respect of which the plaintiff claimed the right (*m*). The acceptance of an allotment under an award made by commissioners under an Inclosure Act by a person against his interest is evidence that the land allotted was waste of the manor (*n*).

(*e*) *Doe* v. *Edwards*, 5 A. & E. 95.
(*f*) *Doe* v. *Coulthred*, 7 A. & E. 235.
(*g*) *Baron de Bode's Case*, 8 Q. B. 208.
(*h*) *Connor* v. *Fitzgerald*, 11 Ir. L. R. 106.
(*i*) *Sly* v. *Dredge*, 2 P. D. 91.
(*k*) *Roe* d. *Trimlestown* v. *Kemmis*, 9 Cl. & F. 780.
(*l*) *La Touche* v. *Hutton*, Ir. R. 9 Eq. at p. 171.
(*m*) *Papendick* v. *Bridgwater*, 5 E. & B. 166; Cockle, 201.
(*n*) *Gery* v. *Redman*, 1 Q. B. D. 161.

The value of the declaration as evidence may be destroyed by proving *aliunde* that although *primâ facie* against the interest of the declarant it is really for his interest, or that it was made with intent to pervert the facts (*o*).

It is also settled law that the declaration, or written statement, is evidence of all the facts which it contains, and that in such cases the difference between oral and written statements is not one of admissibility, but only of weight (*p*).

Thus, in *Davies* v. *Humphreys* (*q*), which was an action for contribution by one of several makers of a promissory note against a co-surety, the plaintiff, to establish the suretyship, relied on a receipt indorsed on the note by the deceased payee acknowledging a part payment of £280 of the principal sum of £300; and adding, "the £300 having originally been advanced to E. H." (the defendant). This was held to be evidence of the defendant's liability.

So, where a paper purported to be an entry, by a deceased receiver, of rents received from T. H., as one of three proprietors, it was held to be evidence that the two other proprietors were equally interested with T. H. (*r*).

When there are entries in an account book which are admissible as being against interest, if there are other items in the book which are closely connected with such admissible entries, then not only may such entries be looked at, but the whole account of which they form an integral and essential part (*s*).

The status of the party making the entry or declaration must sometimes be established before the entry is read,

(*o*) *Taylor* v. *Witham*, 3 Ch. D. 605; Cockle, 198.
(*p*) *R.* v. *Birmingham*, 1 B. & S. 763; *Bewley* v. *Atkinson*, 13 Ch. D. 283.
(*q*) 6 M. & W. 153.
(*r*) *Percival* v. *Nanson*, 7 Ex. 3.
(*s*) *Hudson* v. *Owners of Barge Swiftsure*, 82 L. T. 389.

unless it be made by a person in a public character, in which case due appointment will be presumed (*t*). Thus agency must be proved, where the declaration was by an agent; and accounts of rents signed by a person styling himself clerk to a steward, but not proved *aliunde* to have been so employed, although they were found among family muniments, were rejected, because there was no other evidence given to show that the accounts affected the declarant pecuniarily (*u*). Proof of handwriting and other extrinsic evidence of authenticity will be unnecessary when entries have been made thirty years previously, and are produced from proper custody (*x*).

In an action by the Corporation of Exeter for port duties, documents more than thirty years old, which purported to be the receipts of such duties by ancient receivers, but which were unsigned and in the third person, were admitted (*y*). So, the receipts of an ancient receiver of rents, brought from the muniment chest of the family, are admissible evidence (*z*). It will be observed that, in all the preceding cases where entries have been tendered, great stress has been laid on the circumstances of the custody from which they are produced.

It is not necessary in this class that the declaration shall be made *ante litem motam* (*a*), though the fact that it is made after a controversy has arisen will, no doubt, diminish its value; so would evidence that the declarant had a motive for misrepresenting the facts which render the declaration, although apparently against his interest, really in his favour (*b*).

(*t*) *Davies* v. *Morgan*, 1 C. & J. 587.
(*u*) *De Rutzen* v. *Farr*, 4 A. & E. 53.
(*x*) *Wynne* v. *Tyrwhitt*, 4 B. & Ald. 376.
(*y*) *Mayor of Exeter* v. *Warren*, 5 Q. B. 773.
(*z*) *Musgrave* v. *Emerson*, 10 Q. B. 326.
(*a*) *Whaley* v. *Masserene*, 8 Ir. Jur. (N.S.) 281.
(*b*) *Taylor* v. *Witham*, 3 Ch. D. 605.

Declarations Made in the Course of Duty.

Declarations made by a person, strictly in the course of a business or professional duty, if contemporaneous with the fact, are evidence, after his death, against third persons, of any fact which it was his duty so to record, but not of the surrounding circumstances.

Entries made in a ledger or diary in the ordinary course of business are not admissible in evidence if the writer be still alive, even though he has absconded or is kept away by the other side; though if he be called as a witness he may refresh his memory by referring to them (*c*). If, however, the writer of such an entry be dead, the entry is admissible on proof that it was the duty of the deceased to make such entry. It is a question for the judge and not the jury—as indeed are all questions of admissibility of evidence (*d*)—to decide whether it was or was not the duty of the deceased to make such an entry.

There is, however, an important difference between a declaration made in the ordinary course of business and a declaration against interest. In the latter case the whole of the entry is admissible; in the former case only so much as it was the *duty* of the deceased to make (*e*). "If the entry is

(*c*) Under the Indian Evidence Act (Part I., Chap. II., s. 32) it is not necessary that the declarant should be dead; an entry made against his interest or in the ordinary course of his business is admissible, "if he be dead or cannot be found, or has become incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable."

(*d*) *Bartlett* v. *Smith*, 11 M. & W. 483; Cockle, 10.

(*e*) *Chambers* v. *Bernasconi*, 1 C. M. & R. 347; Cockle, 194.

admitted as being against the interest of the party making it, it carries with it the whole statement; but if the entry is made merely in the course of a man's duty, then it does not go beyond those matters which it was his duty to enter" (*f*).

The leading case on this rule is *Price* v. *Earl of Torrington* (*g*). The short report of it in Salkeld is as follows: "The plaintiff, being a brewer, brought an action against the Earl of Torrington for beer sold and delivered; and the evidence given to charge the defendant was, that the usual course of the plaintiff's dealing was, that the draymen came every night to the clerk of the brewhouse and gave an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen set their names; that the drayman was dead, but that this was his hand set to the book; and this was held good evidence of a delivery; otherwise of the shop book itself singly, without more." On the same principle, in *Pritt* v. *Fairclough* (*h*), after evidence had been given that it was the course of business in the plaintiff's office for a certain clerk, since deceased, to copy all letters, a letter book containing a copy made by that clerk of a letter which the defendant refused to produce, was held good secondary evidence. So, where it was material to show that a licence had been sent to A. by the plaintiff, evidence was given that it was the course of business in the plaintiff's office that such licences should be copied in the letter book and noted before they were sent, and the copy and noted memorandum, in the handwriting of a deceased clerk, that the licence had been sent, were then received (*i*). Declarations by a deceased rector have also been admitted as evidence as to the custom of electing churchwardens in his parish (*k*).

(*f*) *Per* POLLOCK, C.B., in *Percival* v. *Nanson*, 7 Ex. 3.
(*g*) 1 Salk. 285; 2 Smith, L. C. 294.
(*h*) 3 Camp. 305.
(*i*) *Hagedorn* v. *Reid*, 3 Camp. 377.
(*k*) *Bremner* v. *Hull*, Har. & Ruth. 800.

The doctrine was also discussed in *Poole* v. *Dicas* (*l*), where it was held that an entry made in a bill book, in the course of business, by a notary's clerk, since deceased, of the dishonour of a bill which he had been instructed to present for payment, was evidence of the dishonour. And where a surveyor had been employed, in 1864, by a local board, to survey ground for a drainage scheme, entries in his note book, made at the time of the survey, of levels and other figures, for the purpose of his report, were admitted in 1905 to show the line of the spring tides in 1864, he being dead (*m*).

In *Mercer* v. *Denne* (*n*) a survey of Walmer Castle taken in 1816 by direction of the Lord Warden, and an estimate for the repair of the castle, made by the King's engineer, were rejected, because there was nothing to show they were made contemporaneously with the doing of something it was the duty of the deceased official to record, or what his instructions were, or what relation they bore to the documents, or what were the sources of the information on which the documents were based.

In all the above cases great importance was attached to the fact that the entries were immediately subsequent to, and virtually contemporaneous with, the transaction. "In declarations in the course of business, it is essential to prove that the entry was made at the time it purports to bear date: it must be a contemporaneous entry" (*o*). It is sufficient if the entry be made on the same day, or even on the following morning. But where not made until two days after the event it was held not contemporaneous (*p*). The entry, however, need not be made *ante litem motam*. It may often be a man's duty to report to his employer that a controversy has arisen. Moreover, an entry made in the course of duty cannot be excluded merely because it tells in the declarant's favour.

(*l*) 1 Bing. N. C. 649.
(*m*) *Mellor* v. *Walmsley*, [1905] 2 Ch. 164.
(*n*) [1905] 2 Ch. 538.
(*o*) *Per* Parke, B., in *Doe* v. *Turford*, 3 B. & Ad. 890.
(*p*) *The Henry Coxon*, 3 P. D. 156.

It may, nevertheless, be his duty to make it (*q*). The entry must be an entry of a particular thing which it was the duty of the person making the entry to do, and it must also be his duty to record it (*r*).

For example, before the Births and Deaths Registration Act, 1836 (*s*), it was usual to prove a person's age by producing his baptismal certificate. This certificate contained, *inter alia*, the date of birth. The entry by the vicar of the date of birth was not admissible because it was not his duty to enter that; all the certificate proved was that the child was alive at the date of its baptism. So since the Births and Deaths Registration Act it is usual to enter in the register the name of the father; but this is no evidence of paternity; for it is not the duty of the registrar to enter the father's name.

Again, where an action was brought for an illegal arrest, and it was material to ascertain where the arrest was made, but X., who made the arrest, was dead, and it was sought to put in as evidence an entry made by X. at the time which stated the place; it was held that such entry was only admissible to prove the fact and date of the arrest; but not the place, as it was not the duty of X. to make any entry as to the place (*t*).

But where the solicitor of the plaintiff had been instructed to serve on the defendant a notice to quit, and it was the usual practice of the solicitor's clerks to indorse on such notices a memorandum of the fact and time of service, and the clerk who served the notice to quit on the defendant had died before the action came on for hearing, it was held that the memorandum was admissible, as it was the duty of the clerk to make such indorsement (*u*).

Personal custom is not equivalent to a duty; it creates

(*q*) See, however, the *dicta* of Sir ROBERT PHILLIMORE, in *The Henry Coxon, supra.*

(*r*) *Smith* v. *Blakey*, L. R. 2 Q. B. 326; *Trotter* v. *Maclean*, 13 Ch. D. 574.

(*s*) 6 & 7 Will. IV. c. 86.

(*t*) *Chambers* v. *Bernasconi*, 1 C. M. & R. 347; Cockle, 194.

(*u*) *Doe* v. *Turford*, 3 B. & Ad. 890; Cockle, 192.

no responsibility towards any other person. Therefore, entries in the books of a deceased solicitor or bills of costs delivered by him are not admissible on the ground that it was his duty to keep proper books, or that they were made out in the course of his duty (*x*). They may, however, be admissible in evidence for other reasons, as, for instance, if they are against the interest of the declarant. On this principle, the account books of deceased tradesmen, made by themselves, are not evidence for their executors to charge a debtor. So in Ireland, entries in registers kept in Roman Catholic chapels have been held inadmissible (*y*). An entry in a deceased stockbroker's day book was held inadmissible to prove that certain shares were purchased for the client, it not being the duty of the stockbroker, as between himself and his client, to keep the book (*z*).

It has long been settled that, when the entry has been made on hearsay, it will not be received (*a*). In an action for goods sold, where the only evidence of delivery was an entry made by a witness, by the direction of a deceased foreman, who was not present when the goods were delivered, but who, in the course of business, had himself been informed of the delivery by the person whose duty it was to deliver the goods, and who was also dead, the entry was rejected (*b*).

Declarations made in the course of a duty are equally admissible whether they are oral or in writing. Thus, a verbal statement made by a police constable to his inspector, in the course of his duty, was held admissible after the constable's death (*c*). But evidence will not be received of oral statements subsequently made in

(*x*) The contrary was once held by Lord Romilly, in *Rawlins* v. *Richards*, 28 Beav. 370; but this decision cannot be relied upon, after what has been said by the judges in *Bright* v. *Legerton*, 2 De G. F. & J. at p. 617; *Hope* v. *Hope*, [1893] W. N. 21; *Ecroyd* v. *Coulthard*, [1897] W. N. 25.

(*y*) *Ennis* v. *Carrol*, 17 W. R. 344.

(*z*) *Massey* v. *Allen*, 13 Ch. D. 558.

(*a*) *Mercer* v. *Denne*, [1905] 2 Ch. 538.

(*b*) *Brain* v. *Preece*, 11 M. & W. 773.

(*c*) *R.* v. *Buckley*, 13 Cox, 293; Cockle, 195.

order to contradict, nor even to explain, a written entry which has been made in the course of business. Thus, in *Stapylton* v. *Clough* (*d*), to prove service of a notice to quit, a duplicate notice, indorsed with the day of service, and signed in the course of duty by a deceased agent, was tendered; but it was also sought to explain and vary the particulars of the indorsement by evidence of subsequent oral declarations made by the deceased. It was held that the indorsement must be received as it stood.

Entries in the business books of a party, though made in the course of duty, are not at common law admissible in evidence on his behalf (*e*), though they may afford very useful material for his cross-examination. It is, however, provided by Order XXXIII., r. 3, of the R. S. C., 1883, that, where an account is ordered to be taken, the Court may "direct that, in taking the account, the books of account in which the accounts required to be taken have been kept, shall be taken as *primâ facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised." A similar power was conferred on the Court of Chancery by 15 & 16 Vict. c. 86, s. 54 (*f*). The same principle is adopted for proceedings in county courts by Rule 8 of Order XXIV. of the County Court Rules, 1903.

EVIDENCE IN A FORMER PROCEEDING.

With regard to civil actions, it is a general rule that "all evidence taken at the hearing or trial of any cause or matter may be used in any subsequent proceedings in the same cause or matter" (*g*). But

(*d*) 2 E. & B. 933.

(*e*) *Digby* v. *Steadman*, 1 Esp. 328.

(*f*) The power was exercised in *Banks* v. *Cartwright*, 15 W. R. 417, in the case of books of account kept by trustees to which the beneficiaries had access.

(*g*) Order XXXVII., r. 25; as, for instance, on a new trial. There is a corresponding rule in the County Court, County Court Rules, 1903, Order XVIII., r. 12.

the admissibility of evidence taken at the hearing or trial of a former action stands on a different footing. Such evidence is only admissible—

(i.) if the issue is the same in both actions;

(ii.) if the subsequent action is between the same parties as the former action, or their representatives in interest;

(iii.) if the other party or his predecessors in interest had in the former trial an opportunity of cross-examining the witness; and

(iv.) if the witness whose evidence it is sought to use cannot be called on the subsequent trial because he is dead, or insane, or out of the jurisdiction of the Court, or so ill that he probably will never be able to travel, or is kept out of the way by the other party, or, perhaps, cannot be found (*h*).

With regard to criminal proceedings, it very seldom happens that the same issue can ever be re-tried between the Crown and the same prisoner. When, however, this does occur, evidence given at the former trial may, it seems, be received at the subsequent trial on conditions very similar to, but not identical with, those just set out with respect to civil actions.

Evidence given in the former action is only admissible so far as it relates to the issues which are common to both actions (*i*). The parties in the two actions need not be identical; it is sufficient if either of the parties in the former action owned the same property or represented the same interest as that now owned or represented by the present plaintiff or defendant (*k*).

(*h*) *Fry* v. *Wood*, 1 Atk. 445; *Doncaster* v. *Day*, 3 Taunt. 262.
(*i*) *Strutt* v. *Bovingdon*, 5 Esp. 56; *Doe* v. *Derby*, 1 A. & E. 783.
(*k*) *Llanover* v. *Homfray*, 19 Ch. D. 224; *Printing Co.* v. *Drucker*,

But, if in the latter action there is another party, who is neither a successor in title of, nor represented by, any party in the former action, the evidence will not be admissible against him (*l*). Anyone who heard the former evidence may depose to it; except where it was the duty of the judge or other officer of the Court to take the evidence as a deposition or in some other formal record (*m*), in which case notice of intention to read such deposition or record must be given to the other side two days before the trial of the second action (*n*).

In criminal cases, no such evidence is admissible unless at the subsequent trial the same person is accused upon substantially the same facts; for example, if a man acquitted or convicted of robbery with violence, be afterwards tried for the murder of the person robbed, then it can be given, if it be shown that the witness is dead, insane (*o*), or kept out of the way by the prisoner (*p*). It is not clear, however, that such evidence can be given in criminal cases where the witness is too ill to travel, or out of the jurisdiction. It cannot be given, apparently, where the only information before the Court is that the witness cannot be found (*q*). Should power hereafter be given to the Court of Criminal Appeal to grant a new trial, this matter will become one of considerable importance, and the doubts existing with reference to it would probably soon be dispelled.

DEPOSITIONS.

A deposition is the formal record of evidence given on oath, taken down by a magistrate or some

[1894] 2 Q. B., p. 803; *Evans* v. *Merthyr Tydfil Urban District Council*, [1899] 1 Ch. 241.

(*l*) *Wright* v. *Doe*, 1 A. & E. 3; *Brown* v. *White*, 24 W. R. 456.

(*m*) *Ex parte Newall, In re Newall*, 3 Mont. & Ayr. 666.

(*n*) Order XXXVII., r. 3.

(*o*) *R.* v. *Eriswell*, 3 T. R. 720.

(*p*) *R.* v. *Scaife*, 17 Q. B. 238, 243.

(*q*) *R.* v. *Scaife*, *supra*; *R.* v. *Hogg* 6 C. & P. 176; *R.* v. *Marshall* Car. & M. 147.

officer of a Court, with a view to its being used in a subsequent proceeding. It is read over to the witness after it is written, corrected if necessary, and then signed by him. There are many kinds of depositions; they are used both in civil and criminal proceedings.

(i.) *Depositions under the Indictable Offences Act*, 1848.

When anyone is charged with an indictable offence, the case is usually investigated by a justice of the peace before it is sent for trial at the Assizes or Quarter Sessions. The justice of the peace may summon before him on this preliminary inquiry anyone whom he believes to have knowledge of the facts, and compel him to give evidence on oath. While such evidence is being given, the substance of it is written down by the clerk to the justices; he should record every material fact stated by any witness, whether it tells for or against the accused. As soon as it is decided to send the case for trial, this officer reads over to each witness the notes of his evidence. This gives the witness an opportunity of correcting or adding to them. The witness then signs the deposition as being correct. The depositions, with the exhibits, if any, attached to them, and the prisoner's statement (*r*), are then remitted to the clerk of the Court in which the prisoner is to be tried.

If on the day of trial the witness is dead, or too ill to travel, or has become insane, or is kept away

(*r*) As to the prisoner's statement, see *ante*, pp. 99, 100.

by the prisoner or his friends, the deposition of this witness can, after formal proof, be read to the jury in Court.

If a prisoner has been committed for trial on the oral depositions of witnesses, it would be manifestly unfair to admit their depositions, although certified by the committing magistrate, to be given in evidence against the prisoner, as long as the original witnesses can be produced before the jury, confronted with the prisoner, and subjected to the cross-examination of the latter, or his counsel in open Court; and such depositions are secondary evidence, which is admissible only in certain cases where the original deponents cannot be produced (*s*).

It has been held that, where the inquiry has been commenced before one magistrate and completed before another, the second magistrate may, instead of taking the evidence *de novo*, re-call the witnesses, have them re-sworn, read their depositions over to them, telling them to correct them if necessary, and then allow counsel further to examine and cross-examine the witnesses (*t*).

The admissibility of such depositions is regulated by sect. 17 of the Indictable Offences Act, 1848. It must be shown (1) that the deposition was taken in the presence of the magistrate and of the prisoner (*u*), and that the latter either cross-examined, or had an opportunity of cross-examining, the deponent. (2) That it has been signed by the witness and also by the magistrate. But where the witness was unable to sign, owing to injuries to her hands, but she assented to the depositions on their being read over to her, they were held admissible (*x*). (3) That it was made on oath by the witness, or on affirmation in such cases only in which an affirmation is

(*s*) See *infra*, and *post*, p. 285.
(*t*) *Ex parte Bottomley*, [1909] 2 K. B. 14.
(*u*) *R.* v. *Watts*, L. & C. 339.
(*x*) *R.* v. *Holloway*, 65 J. P. 712.

allowed. (4) That the deponent is either dead (*y*) or so ill as not to be able to travel (or is absent for certain other causes, as mentioned below).

Only the first and last of these conditions are required to be distinctly proved, and the last is usually proved first. The signatures, purporting to be authentic, are presumed to be so until proved to be otherwise. The christian name of the witness may be proved by anyone who saw the witness sign (*z*); and the deposition is declared, on the face of it, to be taken on oath. It is not enough to show that the deposition purports to be signed by the magistrate, but it must also be shown affirmatively by the prosecutor that the deposition was taken in the presence of the prisoner, and that he or his counsel or solicitor had a full opportunity of cross-examining the witness.

The last condition does not contain all the circumstances in which a deposition is generally admissible. Thus, before the statute, the deposition was received at common law, not merely on proof that the deponent was either dead, or so ill as to be unable to travel, but if he was proved to have become permanently insane (*a*), or to be actually insane at the time of trial with a possibility of recovery (*b*). It neither was nor is necessary to show that the illness under which a deponent is suffering is of a permanent, or of more than a temporary, nature; but where the illness of the witness is proved not to be serious, the judge may and will, in his discretion, postpone the trial until he has recovered; and this is the proper course whenever such postponement does not clearly clash with public convenience.

The illness must be real and serious, and there must either be a physical incapability of locomotion, or a probability that it might dangerously affect the witness's health (*c*). It is desirable, when it is possible, to prove

(*y*) *R.* v. *Butcher*, 64 J. P. 808.
(*z*) *R.* v. *Foote*, 26 L. J. M. C. 79.
(*a*) *R.* v. *Eriswell*, 3 T. R. 707.
(*b*) *R.* v. *Marshall*, Car. & M. 147.
(*c*) *R.* v. *Day*, 19 L. T. 35.

this fact by a medical attendant, but it may be proved by anyone who has seen and examined the deponent recently (*d*). The Court will inquire scrupulously and even suspiciously into all these circumstances before receiving the deposition; and will reject it when the alleged illness appears not to be sufficiently serious to excuse the absence of the deponent (*e*). Pregnancy may or may not be sufficient to bring the case within the statute (*f*); insanity obviously is. Where a witness had had an attack of paralysis, his deposition was read, as he could neither hear nor speak, although it would not have endangered his life to come into Court (*g*). The fact that a female witness was seventy-four years of age, and nervous, and (in the opinion of a medical witness) likely to faint under cross-examination, has been held not to amount to such inability to travel as to make her deposition admissible (*h*).

It is also settled that a deposition will be received if the deponent is proved to have been kept out of the way and prevented from appearing at the trial by the act of the prisoner or his agents, or by collusion with him or his friends (*i*). It is necessary to create by evidence a reasonable presumption that the prisoner's agents have been authorised or sanctioned by him to procure the absence of the witness. In such a case the deposition is evidence only against the prisoner who procured the absence of the deponent, and not against other prisoners in the same indictment who are not implicated in the collusion (*k*). Unless the absence of the witness is accounted for in some one of these ways, his deposition cannot be received. When the deponent is

(*d*) *R.* v. *Noakes*, [1917] 1 K. B. 581.
(*e*) *R.* v. *Wellings*, 3 Q. B. D. 426.
(*f*) *R.* v. *Wellings*, *supra*.
(*g*) *R.* v. *Cockburn*, Dears. & B. 203; and see *Beresford* v. *Attorney-General*, [1918] P. 33.
(*h*) *R.* v. *Farrell*, L. R. 2 C. C. R. 116.
(*i*) *R.* v. *Gutteridge*, 9 C. & P. 471.
(*k*) *R.* v. *Scaife*, 2 Den. 281.

in a foreign country, his deposition cannot, on that ground alone, be read (*l*).

Each deposition strictly should be separately signed by the committing magistrate (*m*), but it is sufficient if the signature or signatures be placed at the end of the depositions, even though they are written on different sheets of paper, which are only connected by a pin (*n*). The depositions must be taken in the presence both of the magistrate and of the prisoner (*o*). They may be taken at a hospital: it is not necessary for such a purpose that the magistrate should sit in his accustomed Court (*p*).

If the depositions are lost without fraud or gross negligence before trial, and cannot be found after diligent search, they may be proved by a copy produced and certified by the magistrate's clerk (*q*); or by an examined copy.

It is the duty of the clerk to the justices to record every material statement made by a witness; hence the judge at the trial is always reluctant to admit oral evidence to the effect that a certain fact was stated on oath before the justices which is not found on the depositions. Such evidence, however, is not, as a rule, excluded, though strictly it is not admissible (*r*).

(ii.) *Depositions under the Criminal Law Amendment Act*, 1867.

This Act enables depositions to be taken for the perpetuation of testimony in criminal cases. It enacts that a deposition taken in accordance with its provisions may be produced and read as evidence,

(*l*) *R.* v. *Austin*, Dears. 612.
(*m*) 11 & 12 Vict. c. 42, s. 17.
(*n*) *R.* v. *Parker*, L. R. 1 C. C. R. 225.
(*o*) *R.* v. *Watts*, L. & C. 339.
(*p*) *R.* v. *Katz*, 64 J. P. 807.
(*q*) *R.* v. *Shellard*, 9 C. & P. 277.
(*r*) *Parsons* v. *Brown*, 3 Car. & K. 295.

either for or against the accused, upon the trial of any offence to which it relates—

(i.) If the deponent is proved to be dead, or if it is proved that there is no reasonable probability that he will ever be able to travel or to give evidence; and

(ii.) If the deposition purports to be signed by the justice by or before whom it purports to be taken; and

(iii.) If it is proved to the satisfaction of the Court that reasonable notice in writing of the intention to take such deposition was served upon the person (whether prosecutor or accused) against whom it is proposed to be read; and

(iv.) That such person or his counsel or solicitor, had or might have had, if he had chosen to be present, full opportunity of cross-examining the deponent (*s*).

Attention has already been called to this class of depositions under the head of "Relevancy" (*t*).

(iii.) *Depositions taken at a Coroner's Inquest.*

Although a coroner is not bound by any precise rules of evidence, and the issue at an inquest is what was the cause of deceased's death, and not whether his death renders any particular individual guilty of a criminal offence, yet if the jury find that someone is guilty of murder or manslaughter, their verdict has the same force and effect as the finding of a true bill against him by a grand jury formerly had, and he can be tried before the petty jury on that inquisition alone.

It is the duty of the coroner in such cases to "put into writing the statement on oath of those who know the

(*s*) 30 & 31 Vict. c. 35, s. 6.
(*t*) See *ante*, p. 67.

facts and circumstances of the case, and any such deposition shall be signed by the witness and also by the coroner," and he must then, if the jury find a verdict of murder or manslaughter against an individual named, transmit the inquisition and the depositions to the clerk of assize or other proper officer before the trial of prisoners is due to commence (*u*). The person who is under suspicion can always give evidence at the inquest if he chooses, but he is usually cautioned, before being sworn, that he is not bound to answer any incriminating questions (*x*).

These depositions are, under the common law, admissible at the trial if the witnesses do not appear (*y*). There are no statutory provisions on the subject. It is not clear whether the signature of both the coroner and the witness must be proved before the deposition can be read (*z*).

It is doubtful whether a deposition taken in the absence of a prisoner or without his being afforded an opportunity of cross-examining the witness is admissible. Such a deposition was formerly admitted (*a*), but the better opinion now is that it cannot be received (*b*).

The deposition is admissible between third parties to show there has been a judicial inquiry into the matters to which it refers (*c*).

(iv.) *Depositions of Children.*

Section 29 of the Children Act, 1908 (*d*), provides that on the trial of any person on indictment for an offence of cruelty, or for an offence under the Offences Against the Person Act, 1861, ss. 27, 55 or 56, or for an offence

(*u*) Coroners Act, 1887 (50 & 51 Vict. c. 71), ss. 4, 5.

(*x*) *Wakley* v. *Cooke*, 4 Ex. 511; *R.* v. *Gawthrop*, 59 J. P. 377; cf. *R.* v. *Boyes*, 1 B. & S. 311.

(*y*) See *ante*, p. 280. The Indictable Offences Act, 1848, does not apply.

(*z*) *R.* v. *England*, 2 Leach, 770.

(*a*) *R.* v. *Eriswell*, 3 T. R. at p. 713; Bull. N. P. 242; *R.* v. *Purefoy*, Peake, Ev. 64.

(*b*) *R.* v. *Rigg*, 4 F. & F. 1085; *R.* v. *Wilshaw*, Car. & M. 145; *Sills* v. *Brown*, 9 C. & P. 601; 1 Taylor, Ev. 339.

(*c*) *R.* v. *Gregory*, 15 L. J. M. C. 38.

(*d*) 8 Edw. VII. c. 67.

against a child or young person (*e*) under ss. 5, 42, 43, 52 or 62 of the same Act, or under the Criminal Law Amendment Act, 1885, or for an offence under the Dangerous Performances Acts, 1879 and 1897, or for any other offence involving bodily injury to a child or young person, if the Court is satisfied by the evidence of a duly qualified medical practitioner that the attendance before the Court of the child or young person in respect of whom the offence is alleged to have been committed, would involve serious danger to the life or health of the child or young person, any deposition of the child or young person taken under the Indictable Offences Act, 1848, or under Part II. of the Children Act, 1908, shall be admissible either for or against the accused without further proof if it purports to be signed by the magistrate by and before whom it was taken, and if it is proved that reasonable notice of the intention to take the deposition has been served on the person against whom it is proposed to be used, and that person or his advocate had, or might have had if he had chosen to be present, an opportunity of cross-examining the deponent (*f*).

(v.) *Depositions under the Merchant Shipping Act*, 1894.

This Act applies to both civil and criminal proceedings. It enacts that whenever, in the course of any legal proceedings instituted in any part of His Majesty's dominions, testimony of any witness is required, any deposition that such witness may have previously made on oath in relation to the same subject-matter before any justice or magistrate in His Majesty's dominions or before any British consular officer elsewhere is admissible in evidence, provided that if such a proceeding is instituted in the United Kingdom or a British possession, due proof must be given that such witness cannot be found in that

(*e*) A child is a person under 14 years old; a young person is one between 14 and 16 years old: s. 131.

(*f*) A provision in almost identical terms is contained in s. 14 of the Prevention of Cruelty to Children Act, 1904 (4 Edw. VII. c. 15), as to offences under that Act.

kingdom or possession respectively. If, however, such deposition was made in the United Kingdom, it is not admissible in any proceeding instituted in the United Kingdom, and if it was made in any British possession, it is not admissible in any proceeding instituted in that possession. Moreover, if the proceeding is criminal, the deposition is not admissible unless it was made in the presence of the person accused.

A deposition so made must be authenticated by the signature of the judge, magistrate, or consular officer before whom it was made, and he must certify (if the fact is so) that the accused was present at the taking thereof.

It is not necessary in any case to prove the signature or the official character of the person appearing to have signed any such deposition; and in any criminal proceeding the certificate is (unless the contrary is proved) sufficient evidence of the accused having been so present.

(vi.) *Depositions in other Criminal Cases.*

By s. 6 of the Foreign Jurisdiction Act, 1890 (*g*), a person accused of a crime cognisable by a British Court in a foreign country, is enabled to have the deposition of a witness for the defence taken, under certain conditions, in order that it may be put in evidence without calling the witness. And by the Criminal Evidence Act, 1898 (*h*), the prisoner may himself give evidence on oath before the magistrate if he thinks fit, and his evidence will be taken down in writing, and read over to him and signed by him and forwarded to the Court in the same manner as the depositions of other witnesses.

(vii.) *Depositions in Civil Cases.*

The practice in respect of these depositions is now regulated by Order XXXVII. of the Rules of the

(*g*) 53 & 54 Vict. c. 37.
(*h*) 61 & 62 Vict. c. 36.

Supreme Court (*i*). Rule 5 of this Order enables the Master, where it appears necessary for the purposes of justice (*k*), to make an order for the examination of any person before anyone whom he appoints, and to enable either party to give such deposition in evidence in the action, upon such terms as he shall direct.

This general provision is, however, modified by Rule 18 of the same Order, which provides that—

"Except where by this Order otherwise provided, or directed by the Court or a judge, no deposition shall be given in evidence at the hearing or trial of the cause or matter without the consent of the party against whom the same may be offered, unless the Court or judge is satisfied that the deponent is dead, or beyond the jurisdiction of the Court, or unable from sickness or other infirmity to attend the hearing or trial, in any of which cases the depositions certified under the hand of the person taking the examination shall be admissible in evidence saving all just exceptions without proof of the signature to such certificate."

Hence the very extensive power given by r. 5 is seldom exercised, except in the cases specially mentioned in r. 18. Still there are other possible cases in which it might properly be exercised, *e.g.*, where the deposition is that of a witness to prove *pro formâ* a relevant fact, and also when the consent of the opposite party is withheld *malâ fide*. The sickness or infirmity mentioned in r. 18 need not necessarily be permanent or incurable (*l*).

(viii.) *Depositions under the Extradition Acts and the Fugitive Offenders Act.*

Depositions taken in foreign countries may be used in proceedings taken under the Extradition Act, 1870 (*m*), s. 14 of which provides, that—

(*i*) There are provisions almost identical in the Rules of the County Courts: Order XVIII., r. 18, of the Rules of 1903.
(*k*) As to the practice under this Order, see *post*, pp. 583 *et seq.*
(*l*) *Duke of Beaufort* v. *Crawshay*, L. R. 1 C. P. 699.
(*m*) 33 & 34 Vict. c. 52.

"Depositions or statements on oath, taken in a foreign State, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated (*n*), be received in evidence in proceedings under this Act."

It has been held to be unnecessary that the accused should have been present at the taking of the depositions (*o*); and the Extradition Act of 1873 (*p*), s. 4, enables a magistrate of this country, when acting under an order bearing the seal of a Secretary of State, to take evidence for the purpose of any criminal matter pending in a foreign court or tribunal, whether the accused be present or not, but his presence or absence must be stated in the deposition.

By the Fugitive Offenders Act, 1881 (*q*), s. 29, it is provided that—

"A magistrate may take depositions for the purposes of this Act in the absence of a person accused of an offence in like manner as he might take the same if such person were present and accused of the offence before him.

Depositions (whether taken in the absence of the fugitive or otherwise) and copies thereof, and official certificates of, or judicia documents stating facts, may, if duly authenticated, be received in evidence in proceedings under this Act.

Provided that nothing in this Act shall authorise the reception of any such depositions, copies, certificates, or documents in evidence against a person upon his trial for an offence."

Declarations as to Public and General Rights.

When an issue involves a question of public or general rights, or matters of public or general interest, the rule that hearsay or second-hand evidence is inadmissible is subject to this exception. Declarations of deceased persons of competent knowledge as to matters of public or general interest are admissible. So is evidence of general reputation as to such matters, and also depositions,

(*n*) Authentication is governed by s. 15.
(*o*) See *R.* v. *Ganz*, 9 Q. B. D. 93.
(*p*) 36 & 37 Vict. c. 60.
(*q*) 44 & 45 Vict. c. 69.

judgments, or other proceedings in former litigation between different parties, in which the matters were discussed (*r*).

In the above cases, the declarations must have been made, and the general reputation must have existed, *ante litem motam*, *i.e.*, before the date at which the controversy began which subsequently culminates in a law suit. A contention may be raised and a claim definitely formulated for years or even for generations before any legal proceeding is begun; and evidence which comes into existence during this interval is naturally viewed with suspicion and therefore excluded.

There is no *lis mota* till a dispute has arisen; it is not enough that the right has vested, or that the cause of action has accrued, which afterwards becomes the subject-matter of litigation (*s*). The dispute must relate to the particular subject which is in issue in the subsequent litigation (*t*); though it need not be between the same parties (*u*).

The ground for its reception lies in the supposition that the universality and notoriety of the interests concerned remove the temptation and the ability to misrepresent, which would arise if such evidence were received in matters of merely private and personal concern. Accordingly, it is rejected wherever the point at issue appears to partake more of the nature of a private than of a public interest.

(*r*) *Freeman* v. *Phillipps*, 4 M. & S. 486; *Reed* v. *Jackson*, 1 East, 355; *Earl de la Warr* v. *Miles*, 17 Ch. D. 535.

(*s*) The *dictum* of ALDERSON, B., to the contrary in *Walker* v. *Countess Beauchamp*, 6 C. & P. at p. 561, is expressly overruled in *Shedden* v. *Attorney-General*, 2 Sw. & Tr. 170.

(*t*) *Freeman* v. *Phillipps*, 4 M. & S. 486.

(*u*) *Bullock & Co.* v. *Corry & Co.*, 3 Q. B. D. 356; *Pearce* v. *Foster*, 15 Q. B. D. 114.

Thus a map attached to an old enclosure award, although admissible to prove that a particular road was a public highway, was held inadmissible to prove the boundaries of such highway in favour of a defendant charged with obstructing the same (*x*).

In *Wright* v. *Doe* (*y*), Coltman, J., said:—

"The principle upon which I conceive the exception to rest is this, that the reputation can hardly exist without the concurrence of many parties interested to investigate the subject; and such concurrence is presumptive evidence of the existence of an ancient right, of which, in most cases, direct proof can no longer be given, and ought not to be expected; a restriction now generally admitted as limiting the exception is this, that the right claimed must be of a public nature affecting a considerable number of persons."

It was on this ground decided in a later case that where a former lord of the manor had written at the close of an inventory of his furniture a private memorandum to the effect that he had caused it to be "called in church" that the right of the tenants of the manor to use a certain church path across the demesne was restricted to such as were "tenants above wall," this private memorandum could not be used in evidence by the present lord of the manor to show that the right of way was in fact so restricted; there being nothing to show that it was ever seen or heard of at the time it was written, by anyone except the writer, and consequently could not be contradicted (*z*). So evidence of reputation was received on an issue as to whether the public were entitled to fish in a certain tidal river (*a*).

Such evidence is also admissible in cases of local, as well as of general, public interest, but its value will depend on the vicinity of the witness to the *locus in quo*, and his personal knowledge of the surrounding circumstances. As Parke, B., says in *Crease* v. *Barrett* (*b*):—

(*x*) *R.* v. *Berger*, [1894] 1 Q. B. 823; see also *R.* v. *Bliss*, 7 A. & E. 550; *Mercer* v. *Denne*, [1905] 2 Ch. at p. 560; *Vyner* v. *Wirrall Rural Council*, 73 J. P. 242.

(*y*) 7 A. & E. at p. 360.

(*z*) *Brocklebank* v. *Thompson*, [1903] 2 Ch. 344.

(*a*) *Neill* v. *Duke of Devonshire*, 8 App. Cas. 135, *ante*, p. 60.

(*b*) 1 C. M. & R. 928.

"In a matter in which all are concerned, reputation from any one appears to be receivable; but of course it would be almost worthless, unless it came from persons who were shown to have some means of knowledge, as by living in the neighbourhood."

The next important restriction on the rule under consideration, is contained in the principle that the declarations of deceased persons must be made and the general reputation must exist before the matter now in contest has become or appeared likely to become a subject of judicial controversy.

In *R.* v. *Cotton* (*c*), DAMPIER, J., said :—

"The reason why the declarations of deceased persons [are admitted] upon public rights, made *ante litem motam*, when there was no existing dispute respecting them, is that these declarations are considered as disinterested, dispassionate, and made without any intention to serve a cause or mislead posterity; but the case is entirely altered *post litem motam*, when a controversy has arisen respecting the point to which the declarations apply. Declarations then made are so likely to be produced by interest, prejudice, or passion, that no reliance can safely be placed upon them, and they would more frequently impose upon the understanding than conduce to the elucidation of the truth. It has, therefore, been wisely decided that evidence of reputation arising *post litem motam* shall not be admitted."

The material date is the time when the question began to attract public attention as a controversy, not the commencement of actual litigation—the origin of the controversy, not the commencement of the suit. After the controversy has originated, all declarations are to be excluded, whether the controversy was or was not known to the declarant (*d*). But the law does not exclude declarations which have been made with the express view of preventing disputes, or in direct support of the declarant's title (*e*), or from the declarant being in the same situation, touching the matter in contest, with the party relying on the declaration (*f*).

(*c*) 3 Camp. at p. 446; and see *Richards* v. *Bassett*, 10 B. & C. 657; and *Freeman* v. *Phillipps*, 4 M. & S. 497.

(*d*) *Per* Sir JAMES MANSFIELD, C.J., in *Berkeley Peerage Case*, 4 Camp. 417.

(*e*) *Doe* v. *Davies*, 10 Q. B. 325.

(*f*) *Monkton* v. *Attorney-General*, 2 Russ. & My. 160.

There was formerly considerable conflict of opinion among the judges, as to the admissibility of reputation and the declarations of deceased persons to prove or disprove a claim of prescriptive right (*g*). But in the case of *Weeks* v. *Sparke* (*h*), Lord Ellenborough laid down the principle that when the right claimed does not curtail the general rights of others, being merely the claim of an individual against an individual, such evidence is not admissible. Traditionary reputation has been received as evidence of the boundaries between two parishes and two manors, but not of the boundaries between two estates (*i*).

In *Duke of Newcastle* v. *Hundred of Broxtowe* (*k*), the question was, whether Nottingham Castle was within the hundred: and it was held that Orders made at the county sessions between 1654 and 1660, in which the castle was described as being within the hundred, were admissible, as the justices must be presumed to have had sufficient acquaintance with the subject to which their declarations related; and that, although contrary evidence that the castle was excepted from the hundred was given from Domesday Book and an old charter of Henry VI., the judge was right in telling the jury to act on the evidence of a more modern and continuous reputation. But when the question was as to the rights of the county of the city of Chester, as between that city and the County Palatine of Chester, a decree by a Lord Treasurer and other persons who were not a competent tribunal, and who had no personal knowledge of the facts, except such as they derived from an irregular judicial proceeding, was held inadmissible evidence of reputation (*l*). So an extra-judicial report by a government surveyor, appointed by

(*g*) See, for instance, the judgments in the case of *Morewood* v. *Wood*, 14 East, 328, n.

(*h*) 1 M. & S. 679; Cockle, 212.

(*i*) *Nicholls* v. *Parker*, 14 East, 331, n.; and see *R.* v. *Sutton*, 8 A. & E. 516; and *Pritchard* v. *Powell*, 10 Q. B. 589.

(*k*) 4 B. & Ad. 273; Cockle, 219.

(*l*) *Rogers* v. *Wood*, 2 B. & Ad. 245.

Queen Elizabeth, as to the boundaries of a manor, has been rejected as evidence of such boundaries (*ll*).

An old survey of landed property, taken under the directions of a former proprietor, is no evidence that he was entitled to it (*m*). And old surveys were rejected as evidence of the high-water mark at the time they were made (*n*).

Declarations as to public or general rights may be either written or oral. If written they must be produced from a proper custody, and must bear plain marks of authenticity (*o*); they must also be shown to have been written or prepared by some person who had, or was likely to have had, some knowledge as to the matter of public interest in question. The statement, especially where it is documentary, must contain a clear and unambiguous declaration concerning the disputed issue. It must relate directly to the existence of the right itself, and not to particular facts which may support or negative it. It must be evidence of a public, not a private, right; and the fact that several persons have private rights over the same spot is no evidence of a public right (*p*).

Thus, where the question was whether a certain road was public or private, a statement made by a deceased resident, that he had planted a tree to mark the boundary of the road, was inadmissible (*q*). In one case, to prove a public right of way over a manor, a map of the manor,

(*ll*) *Evans* v. *Taylor*, 7 A. & E. 617, 627.
(*m*) *Daniel* v. *Wilkin*, 7 Ex. 429; but see *Jenkins* v. *Dunraven*, 62 J. P. 661, *post*, p. 297.
(*n*) *Assheton-Smith* v. *Owen*, [1906] 1 Ch. 179.
(*o*) *Hammond* v. *Bradstreet*, 10 Ex. 390.
(*p*) *Per* PARKE, B., in *Earl of Dunraven* v. *Llewellyn*, 15 Q. B. 791.
(*q*) *R.* v. *Bliss*, 7 A. & E. 550; Cockle, 218; see *Crease* v. *Barrett*, 1 C. M. & R. 925.

which had been made by a deceased steward of the manor, was tendered in evidence. The map showed lines made by the deceased steward which indicated clearly some kind of way over the *locus in quo*, but contained nothing to show whether the way was a public one, or only one of several occupation ways such as existed in the manor. The map was clearly inadmissible to prove an occupation way, which is merely a private right; and, there being nothing on the face of the map to show that it was a public way, and the map having been used only to settle the boundaries of the copyholds of the manor, it was rejected (*r*). So Kay, J., in *Bidder* v. *Bridges* (*s*) refused to admit in evidence, on the question of a boundary, the Ordnance map and certain maps from the British Museum, on the ground that they were only the opinions of map makers upon such information as they had at the time. But a map of the manor produced from the manor house where it was usually kept, made by a surveyor conversant with the *locus in quo* and recognised by parish authorities for rating purposes, was in one case held admissible on a question of general right to the waste of the manor. The tithe map was also admitted in this case (*t*). An ancient survey of a manor has been held admissible as to lands within the manor (*u*), and court rolls on a question as to a customary right to dig stones within the manor (*x*).

The conversations of former tenants of a manor, and of other persons interested in it, have been held good evidence as to the boundaries of the manor (*y*). A document purporting to be a survey of a manor, while it was part of the possessions of the Duchy of Cornwall, and coming out of proper custody, was admitted by

(*r*) *Pipe* v. *Fulcher*, 1 E. & E. 111.
(*s*) 54 L. T. 529.
(*t*) *Smith* v. *Lister*, 64 L. J. Q. B. 154; see also *Attorney-General* v. *Antrobus*, [1905] 2 Ch. 188; *Vyner* v. *Wirrall Rural Council*, 73 J. P. 242.
(*u*) *Jenkins* v. *Dunraven*, 62 J. P. 661.
(*x*) *Heath* v. *Deane*, [1905] 2 Ch. 86.
(*y*) *Doe* v. *Sleeman*, 9 Q. B. 298.

Lord ROMILLY (*z*) as evidence of the boundaries and customs of the manor; although a survey of a manor belonging to Oliver Cromwell as his private property and taken by commissioners appointed by him, containing also a presentment by a jury that certain dues were payable to the lord, was held inadmissible as a public document, or as reputation to prove such dues (*a*).

Whenever the question is one in which all the inhabitants of a manor, or all the tenants of it or of a particular district of it, are interested, reputation from any deceased inhabitant or tenant, or even deceased residents in the manor, is admissible, such residents having presumably a knowledge of such local customs (*b*).

On an issue whether or not certain land in a district repairing its own roads was a common highway, it has been held admissible, but slight, evidence that, before the point was litigated, the inhabitants held a public meeting to consider the repair of the way, and that several of them, since dead, signed a paper on the occasion, stating that the land was not a public highway (*c*). So the verdict or presentment of a jury summoned by a Court of competent jurisdiction to determine the boundaries of two manors is admissible evidence of reputation, in an issue as to the boundary of a third manor, which is conterminous with one of the former (*d*). But an award, made in a dispute as to the boundaries of two private estates, is not admissible as evidence of reputation (*e*).

Standard public historical works are admissible to prove a matter relating to the kingdom at large (*f*), such as the death of a sovereign or the time of his accession.

(*z*) *Smith* v. *Earl Brownlow*, L. R. 9 Eq. 241.

(*a*) *Duke of Beaufort* v. *Smith*, 4 Ex. 450.

(*b*) *Per* PARKE, B., in *Earl of Dunraven* v. *Llewellyn*, 15 Q. B. 791. But see *Evans* v. *Merthyr Tydfil U. D. C.*, [1899] 1 Ch. 241.

(*c*) *Barraclough* v. *Johnson*, 8 A. & E. 99.

(*d*) *Brisco* v. *Lomax*, 8 A. & E. 198; and see *R.* v. *Bedfordshire*, 4 E. & B. 535.

(*e*) *Evans* v. *Rees*, 10 A. & E. 151; *Lady Wenman* v. *Mackenzie*, 5 E. & B. 447.

(*f*) Bull. N. P. 248.

They are admissible to prove ancient facts of a public nature (*g*), although not to prove a particular or local custom (*h*). Standard maps and charts which are offered for sale to the general public are admitted as evidence of general geographical facts, such as the relative position of countries, counties and towns: and distances (other than minute distances) may be proved by the use of the Ordnance maps (*i*).

Peerages, directories, calendars, or other non-official publications, are inadmissible. But the Navy and Army Lists are now official publications, and their contents may be proved by an examined copy.

Declarations in Pedigree Cases.

In actions where the relationship and descent of members of a family are in issue, the rule excluding hearsay is waived to some extent, and the statements of deceased persons who were connected by blood or marriage with the family are admissible to prove the pedigree, provided those persons were on terms of such intimacy with the family as to render it probable that they could give accurate information on such matters. But no declaration made by a deceased person as to any matter of pedigree will be received, unless it first be established by other evidence that the declarant was legitimately related by blood, or was the husband or wife of a person legitimately related by blood, to the party whose pedigree is in issue (*k*). Moreover, such declarations, as in the class last

(*g*) *Read* v. *Bishop of Lincoln*, [1892] A. C. 653.
(*h*) *Stainer* v. *Droitwich*, 1 Salk. 281.
(*i*) *Mouflet* v. *Cole*, L. R. 8 Ex. 35; but see *Hammond* v. *Bradstreet*, 10 Ex. 390, *ante*, p. 296.
(*k*) *Shrewsbury Peerage Case*, 7 H. L. Cas. at p. 26.

mentioned, will be inadmissible, unless made *ante litem motam.*

It is for the judge to decide, before he admits the evidence as to pedigree, whether the declarant has been proved by the antecedent evidence to have been sufficiently connected by consanguinity or affinity to the family in question (*l*). Even then it is necessary that these relations should have been on terms of sufficient intimacy with the family as to render it probable that their information was accurate (*m*). The declarations of persons other than blood relations, and their husbands or wives, are not admissible. Thus, the declarations of deceased servants and intimate acquaintances are rejected (*n*), even though they were in the nature of dying declarations (*o*); nor are the declarations of illegitimate relations received (*p*).

The declarations by a deceased husband as to his wife's legitimacy are admissible, as well as those of her blood relations (*q*). Again, in *Doe* v. *Randall* (*r*), it was held that the declaration of a deceased woman of statements made by her former husband that his estate would go to J. F., and then to J. F.'s heir, were admissible to show the relationship of the lessor of the plaintiff to J. F. This was held sufficient on the ground that "the declarations of deceased persons must be taken with all their imperfections, and if they appear to have been made honestly and fairly, they are receivable." The statement of a wife as to her husband's family, and that of a husband as to his wife's family, stand upon the same footing (*s*).

(*l*) *Per* Lord ELDON, in the *Berkeley Peerage Case*, 4 Camp. 419; *Lyell* v. *Kennedy*, 14 App. Cas. 451; and see the remarks of Lord ERSKINE, in *Vowles* v. *Young*, 13 Ves. 147.
(*m*) *Whitelocke* v. *Baker*, 13 Ves. 511.
(*n*) *Johnson* v. *Lawson*, 9 Moore, 183; Cockle, 209.
(*o*) *Doe* v. *Ridgway*, 4 B. & Ald. 53.
(*p*) *Doe* v. *Barton*, 2 M. & R. 28.
(*q*) *Vowles* v. *Young*, 13 Ves. 147.
(*r*) 2 M. & P. 20.
(*s*) See *Shrewsbury Peerage Case*, 7 H. L. Cas. 23.

It makes no difference that the declarant is in the same position as the person tendering the evidence. Thus, the declarations of a deceased sister of the plaintiff as to their legitimacy have been received (*t*), but a statement by a deceased person who was twice married, which tended to invalidate his first and to establish his second marriage, has been rejected (*u*).

The term "pedigree," in this connection, embraces not only general questions of descent and relationship, but also the particular facts of birth, marriage and death, and the times when, either absolutely or relatively, those events happened. All these facts, therefore, may be proved from hearsay derived from relatives. It has been doubted whether specific dates can be so proved; but the preponderance of authority clearly is that they can be (*x*). The written memorandum of a father as to the time when his child was born, has been received to prove when the infant would come of age (*y*). But an order of removal was quashed for being founded merely on the pauper's own evidence as to the time and place of her birth, because the statement was held to be one which she could not make of her own knowledge (*z*).

As to what are questions of pedigree, it has been said, on the authority of an old case (*a*):—

"Hearsay is good evidence to prove who is my grandfather, when he married, and what children he had, etc., of which it is not reasonable to presume I have better evidence. So, to prove my father, mother, cousin, or other relation, beyond the sea, dead; and the common reputation and belief of it in the family gives credit to such evidence."

Hence the declaration need not be made by the deceased to the witness as of his own knowledge,

(*t*) *Doe* v. *Davies*, 10 Q. B. 314; *Monkton* v. *Attorney-General*, 2 Russ. & My. 159.

(*u*) *Plant* v. *Taylor*, 7 H. & N. 211.

(*x*) *Haines* v. *Guthrie*, 13 Q. B. D. 818.

(*y*) *Per* Lord ELLENBOROUGH, in *Roe* v. *Rawlings*, 7 East, 290.

(*z*) *R.* v. *Rishworth*, 2 Q. B. 487; now see 39 & 40 Vict. c. 61, s. 34.

(*a*) *Grimwade* v. *Stephens* (Kent Assizes, 1697), Bull. N. P. 294, cited in note 15 East, 294.

provided his information was derived from other members of his family. Thus, evidence that a person went abroad when a young man, and, according to the repute of the family, had afterwards died in the West Indies, and that the family had never heard of his being married, is strictly admissible to show that he died unmarried (*b*).

On this ground, not merely oral declarations of deceased persons connected with the family, but old family documents, genealogies and entries in family Bibles (*c*), if produced from a proper source (*d*), inscriptions on tombstones (*e*), or walls, or rings, if sufficiently authenticated as genuine, and as having been recognised as such by the family, will be received (*f*). Thus, in the *Sussex Peerage Case* (*g*), an entry made in her prayer-book, by Lady Augusta Murray, of her marriage at Rome to the Duke of Sussex, was received, not as conclusive proof, but as a declaration made by one of the parties. So in *Lyell* v. *Kennedy* (*h*), the House of Lords held that certain proceedings in which one James Martin was a defendant were admissible to prove that in those proceedings James Martin by his defence admitted that one Elspeth Duncan was his mother.

In accordance with the rules recognised in the preceding cases, a cancelled will of an ancestor, found among family papers, has been received as a declaration concerning the relations of the family (*i*); and so has an unexecuted will in the handwriting of the intending testator, which was treated as a statement of the fact of relationship, not merely as a statement of testamentary intentions (*k*). Pedigrees hung up in family mansions (*l*); a marriage

(*b*) *Doe* v. *Griffin*, 15 East, 293; Cockle, 210.
(*c*) Cf. *Hubbard* v. *Lees*, L. R. 1 Ex. 255.
(*d*) *Davies* v. *Lowndes*, 6 Man. & G. 525.
(*e*) *Haslam* v. *Crow*, 19 W. R. 969.
(*f*) See *The Fairfax Peerage Case*, [1908] W. N. 226.
(*g*) 11 Cl. & F. 85.
(*h*) 14 App. Cas. 437.
(*i*) *Doe* v. *Earl of Pembroke*, 11 East, 504.
(*k*) *Re Lambert*, 56 L. J. Ch. 122.
(*l*) *Goodright* v. *Moss*, Cowp. 591; Cockle, 211.

certificate kept by the family (*m*); a genealogy made by a deceased member of a family, even though purporting to be founded partly on hearsay (*n*); engravings on rings (*o*); coffin-plates, and monumental inscriptions generally are regarded as admissible for what they are worth (*p*). But evidence of this kind is only admissible when questions of pedigree are directly in issue, not where they arise incidentally in the course of an action. Thus in an action for goods sold and delivered where the defendant pleaded infancy, it was sought to prove the plea by a statement contained in an affidavit made by the defendant's deceased father in a chancery suit to which the plaintiff was not a party; but it was held that, there being no question of pedigree in the action, the evidence was not admissible (*q*).

Not only hearsay declarations of deceased relatives, but also proof of the manner in which a person has been brought up and treated by his family, will be evidence. In the *Berkeley Peerage Case*, Sir JAMES MANSFIELD, C.J., said:—

"If the father is proved to have brought up the party as his legitimate son, this is sufficient evidence of legitimacy till impeached; and indeed it amounts to a daily assertion that the son is legitimate" (*r*).

In *Sturla* v. *Freccia* (*s*), Lord BLACKBURN said:—

"Statements by deceased members of the family may be proved not only by showing that they actually made the statements, but by showing that they acted on them, or assented to them, or did anything that amounted to showing that they recognised them."

Lastly, declarations of deceased persons to be admissible must have been made *ante litem motam*, even if the declarant was unaware of the controversy. On this head it is only necessary to refer to the decision,

(*m*) *Doe* v. *Davies*, 10 Q. B. 314.
(*n*) *Monkton* v. *Attorney-General*, 2 Russ. & My. 147.
(*o*) *Vowles* v. *Young*, 13 Ves. 144.
(*p*) *Davies* v. *Lowndes*, 6 Man. & G. 527.
(*q*) *Haines* v. *Guthrie*, 13 Q. B. D. 818.
(*r*) 4 Camp. 416; cf. *Khajah Hidayut Oollah* v. *Rai Jan Khanum*, 3 Moo. Ind. App. 295.
(*s*) 5 App. Cas. 641.

which has been already quoted, of Sir JAMES MANSFIELD, C.J., in the *Berkeley Peerage Case*, that the *lis mota*, or beginning of the litigation, dates from the origin of the controversy, and not from the commencement of the trial (*t*). When a question of pedigree has assumed such a degree of conflicting interest, that the declarant must be reasonably presumed to be under the influence of undue partiality or prejudice, the disposition of the Courts is either to reject his evidence altogether, or to receive it only with the strict limitations as to credibility which are laid down by the judges in their answer to the third question in the *Berkeley Peerage Case*. In a case of disputed descent from a lunatic, one of the claimants was allowed to give in evidence a deposition, made by a deceased relation of the lunatic before a Master in Chancery on an inquiry to discover who was entitled by consanguinity to become committee. It was urged that the deposition was inadmissible as being made *post litem motam*; but the Court held that it was admissible (*u*).

DECLARATIONS BY A PATIENT AS TO HIS SYMPTOMS.

Any statement made by a patient as to the state of his health, or as to his physical condition at the time of the statement, is admissible, whether the patient subsequently dies or recovers. In practice such statements are seldom received unless they were made to a medical man who was in attendance upon the invalid; strictly, however, it would seem that such a statement can be reported by anyone who heard it, whether it was made to a medical man or not. But only so much of the statement made on the occasion is admissible as relates to the

(*t*) *Ante*, p. 294. See also *Butler* v. *Mountgarrett*, 7 H. L. Cas. 633; Cockle, 206.

(*u*) *Gee* v. *Good*, 29 L. T. (o.s.) 128; and see *Frederick* v. *Attorney-General*, L. R. 3 P. & D. 196.

symptoms and sufferings of the patient; any narrative as to the events which reduced him to his present condition will be excluded; such events must be proved by primary evidence; and no statement as to them can be received, unless it follows so immediately after the event that it can fairly be deemed part of the same transaction, in which event it becomes admissible as part of the "*Res Gestæ*" (*x*).

The leading case on this subject is *Aveson* v. *Lord Kinnaird* (*y*). There the plaintiff sued upon a policy of insurance upon his wife's life, which had been granted to him by the defendants, on the faith of a declaration that the wife at the time it was granted was in good health. The defendants pleaded that this declaration was false to the knowledge of the plaintiff, and that the policy was therefore void. In support of this plea they called as a witness a woman who had visited the deceased a few days before the policy was granted and proposed to examine her as to statements made by the deceased woman on that occasion about her state of health at that time. The evidence was objected to, but Graham, B., admitted it "as in general any opinion of the state of health of a person must partly be formed on the accounts which such person gives of his complaints." The witness then proved that she found the plaintiff's wife in bed at 11 o'clock in the forenoon, that the latter stated that she was very poorly, that she had been to Manchester a day or two before, that her husband had been insuring her life, that she was not well nor fit to go when she went, that it would be ten days before the policy could be returned, and that she was afraid she could not live till it was made, and her husband would not get the money. On an application for a new trial on the ground of misreception of this evidence, it was held that it had been

(*x*) See *ante*, p. 61.
(*y*) 6 East, 188.

properly admitted. In delivering judgment in this case, LAWRENCE, J., said (*z*) :—

"As to the general ground of objection to the evidence as hearsay, it is in every day's experience in actions of assault, that what a man has said of himself to his surgeon is evidence to show what he suffered by reason of the assault."

So in *R.* v. *Johnson* (*a*), the accused was indicted for poisoning her husband. In order to prove that the deceased was in good health a few days before his death, evidence was admitted of a conversation held about that time between the deceased and the witness with regard to the former's state of health at that time.

(*z*) 6 East, at p. 198.
(*a*) 2 Car. & K. 354.

CHAPTER IX.

SECONDARY DOCUMENTARY EVIDENCE.

If an original document for any reason is not produced in court, the party who relies upon it is in some cases permitted to prove the terms of it, either by putting in a copy of it or by calling someone who has seen the original and recollects its contents. In other words, secondary documentary evidence may in itself be either documentary or oral. And when any kind of secondary documentary evidence is admissible, all kinds are equally admissible. There are no degrees of secondary documentary evidence.

The rules which govern secondary documentary evidence differ in some material respects from those which regulate secondary oral evidence. It cannot be said that in all cases there are no degrees of secondary oral evidence. Let us suppose that a witness, who gave evidence before the magistrates on a criminal charge in the presence of the person accused, and whose deposition was then read over to him and signed by him as being correct, has died before the trial of the indictment, and that it is proposed to prove what he then said by secondary evidence. It would be untrue to say that this could be done by any kind of secondary evidence. None of the other witnesses who were called before the magistrates can come

forward and state their recollection of what the deceased witness then said. Even a transcript of a shorthand writer's note of what he said would be inadmissible. The only way in which his evidence can be reported to the Court is by the production of the official deposition taken in accordance with the statute (*a*). The maxim, then, that "there are no degrees of secondary evidence," is too wide in the present day, so far as secondary oral evidence is concerned.

But it applies with full force to secondary documentary evidence. If a material document has been lost or destroyed, secondary evidence can be given of its contents, and this can be done in many ways with equal propriety. The party who relies upon it can put in a copy of it if he has one. Anyone who ever read the document can come forward and state his recollection of the contents; so can the writer of it. All these methods are equally admissible; no one of them is technically "better" than any other. But the absence of the primary evidence must first be explained to the satisfaction of the Court; for all secondary documentary evidence is *primâ facie* inadmissible.

Thus, if an action be brought on a contract which is contained in a writing, the writing itself is primary evidence, and should be produced to show the terms of the contract. As long as it exists, and can be obtained by reasonable diligence, no other written or oral evidence of its contents will be received; but if it be destroyed, or if it cannot be found after proper search, or if an adverse party holding it refuses to produce it after due notice,

(*a*) 11 & 12 Vict. c. 42, s. 17, *ante*, p. 281.

then either written or oral evidence may be given by anyone who is acquainted with the contents of the written instrument. Again, a witness cannot be asked whether his name is written in a book; but the book must be produced, or its non-production be excused. He cannot be examined as to the contents of a letter, but the original must be produced and read (*b*). Similarly, oral evidence of the words of a libel is inadmissible as long as the writing, or print, is producible. So where it appears that a representation or statement by a witness was made in writing, he will not be allowed to say what the statement was; the writing must be produced to prove it. In all such cases oral evidence will be inadmissible, until it be proved that every endeavour has been used, without success, to produce the writing.

But as soon as the absence of the original document has been accounted for, any kind of admissible secondary evidence may be substituted for it. Thus, a lost deed may be proved, either by an examined copy (*c*), or by oral evidence of anyone who can swear positively to the contents of the original. Therefore, where it appeared that a party was in possession of a copy of an original, which was not produced, it was held that he was not obliged to produce the copy, but might give oral evidence of the contents of the original (*d*). And a vendor is not bound to procure or produce a document which is of record in Scotland, but may give secondary evidence of its contents (*e*). So, in *Doe* v. *Ross* (*f*), it was held that oral evidence of an original might be substituted for an attested copy, which was tendered but rejected for want of a stamp. It is not, however, to be supposed that oral evidence of a document, although in some cases equally admissible with an attested or examined copy, is therefore

(*b*) *The Queen's Case*, 2 B. & B. 284, 286.

(*c*) But not by what purports to be an attested copy, though the death and handwriting of the attesting witnesses be proved (*Brindley* v. *Woodhouse*, 1 Car. & K. 647).

(*d*) *Brown* v. *Woodman*, 6 C. & P. 206.

(*e*) *Halkett* v. *Earl of Dudley*, [1907] 1 Ch. 590.

(*f*) 7 M. & W. 102; Cockle, 324.

entitled to the same credit; and it will be for a jury to place their own estimate on the value of the witness's memory.

Secondary evidence may be given of the contents of a lost will as well as of any other lost instrument (*g*). To obtain probate of a lost will not only must its contents be proved, but also its due execution and attestation (*h*). But declarations made by a testator after the date of an alleged will are not admissible to prove the execution of the will, and they are equally inadmissible to prove that the will was executed in duplicate (*i*). So parol evidence is admissible to prove the contents of a written acknowledgment which has been lost (*k*).

It will be presumed, in the absence of contrary evidence, that the original was properly stamped, if it required to be stamped (*l*), and an unstamped copy will be good secondary evidence; but neither at law (*m*) nor in equity (*n*) can secondary evidence of the contents of an unstamped agreement be given, even though it was destroyed by the wrongful act of the party objecting to such evidence.

But, in a later case, the Court looked at a copy of an unstamped document, not as an agreement, but as a document evidencing the terms upon which a defendant company proposed to sell if not restrained (*o*).

Secondary, even more than primary, documentary evidence requires a witness or witnesses to support it. This is so whether it is sought to substitute for the original either a copy of it or some person's

(*g*) *Sugden* v. *Lord St. Leonards*, 1 P. D. 154; but see *Woodward* v. *Goulstone*, 11 App. Cas. 469.

(*h*) *Harris* v. *Knight*, 15 P. D. 170.

(*i*) *Atkinson* v. *Morris*, [1897] P. 40; compare *In the Goods of Leigh*, [1892] P. 82, where the will had been torn into pieces after the testator's death and some of the pieces had been lost.

(*k*) *Read* v. *Price*, [1909] 2 K. B. 724.

(*l*) *Marine Investment Co.* v. *Haviside*, L. R. 5 H. L. 624.

(*m*) *Rippiner* v. *Wright*, 2 B. & Ald. 478.

(*n*) *Smith* v. *Henley*, 1 Phil. 391.

(*o*) *Mason* v. *Motor Traction Co.*, [1905] 1 Ch. 419.

recollection of its contents. The original document itself must of course be produced at the trial if it be possible to obtain it. Where it has passed through many hands, it must be carefully traced and its ultimate loss or destruction clearly proved (*p*). Where there are several originals, each must be accounted for before secondary evidence can be given of any one (*q*). Next, a witness must be called either (a) to state that he had read the original and then to give his recollection of its contents, or (b) to produce a copy and prove that it is an accurate copy of the original. For the latter purpose, it is generally necessary to call the person who made the copy tendered in evidence, or a person who subsequently read that copy, compared it with the original and found it to be correct (*r*). Any party who seeks to put in a copy of a letter or other document sent to his opponent must prove that the document which he tenders in evidence is a correct copy of that which was actually sent. It may be that that which is put forward as a true copy is only the draft of a letter which he meant to send, but eventually tore up; that which he actually sent being an amended or extended version of it.

There are several kinds of copies. We have already dealt with four different kinds—examined copies, certified copies, office copies, and copies printed by the official printer—in the chapter on

(*p*) *Fryer* v. *Gathercole*, 4 Ex. 262; *Adams* v. *Kelly*, Ry. & Moo. 157.
(*q*) *Per* Parke, B., in *Alivon* v. *Furnival*, 1 C. M. & R. 292.
(*r*) *Fisher* v. *Samuda*, 1 Camp. 193.

Public Documents (*s*). In the same chapter we have pointed out (*t*) that the probate of a will takes rank as primary evidence. It is indeed of superior efficacy to the original will itself, for it records the judgment of the Court as to the due execution of the will, and establishes the title of the executors to administer the estate of the deceased. There was formerly also a kind of copy called an exemplification, which is now practically obsolete. Formerly the judgment of any superior court of law or equity could only be proved in any other court by producing either the original judgment roll itself or an exemplification of it under the Great Seal. Both methods were costly; and the exemplification —which was after all only a kind of *édition de luxe* of an office copy—has now been superseded by that humbler mode of proof (*u*). Other kinds of copies are sometimes seen in court. The Master will in a proper case order a party who is in possession of a material document to permit his opponent to take photographic or facsimile copies of it, *e.g.*, where there are corrections and interlineations in the original, or where one party denies that he wrote the original, though it purports to be in his handwriting (*x*). And extracts from the business books of a trading company, of a banker and of a tradesman will in some cases be received in evidence, if verified by a proper affidavit (*y*).

(*s*) *Ante*, p. 214.
(*t*) *Ante*, p. 222.
(*u*) See Order XXXVII., r. 4, *ante*, p. 215.
(*x*) *Davey* v. *Pemberton*, 11 C. B. (N.S.) 628; *Lewis* v. *Earl of Londesborough*, [1893] 2 Q. B. 191.
(*y*) See *post*, p. 320.

It is important to determine what documents are copies and what are not. The draft of a deed or agreement is not the same thing as a copy of it, and cannot be read unless there be evidence to show that the original was copied from that draft, and even then the engrossment may have been altered before execution and without the corresponding alterations being made in the draft. But drafts endorsed with memoranda which showed that certain deeds were engrossed from them have been held good secondary evidence of the contents of such deeds (*z*). Where an edition of a newspaper is struck off the same type, any copy is primary evidence of any other, as also are lithographs from the same block, photographs from the same negative, or any copies produced by a process securing uniformity. None of these are copies in the legal sense of the word. They are all counterpart originals, and each is primary evidence of the contents of the rest (*a*). Counterparts stand on a footing superior to mere copies; for they are primary evidence against the party executing them and those claiming under him, although no notice may have been given to produce the original. As against other parties to the contract they are only secondary evidence.

But although either a copy or oral proof of an original will be equally admissible as secondary evidence, the copy of a copy will never (in the absence of express statutory provision) be admitted, for it is one step farther removed from the original (*b*). Neither is anyone's recollection of the copy derived from a perusal of it admissible, even though he proves that both original and copy have been destroyed (*c*). A duplicate copy in the same circumstances would be admissible.

(*z*) *Waldy* v. *Gray*, L. R. 20 Eq. at p. 250.
(*a*) *R.* v. *Watson*, 2 Stark. at p. 129; *Johnson* v. *Hudson*, 7 A. & E. 233, n.
(*b*) *Liebman* v. *Pooley*, 1 Stark. 167.
(*c*) *Everingham* v. *Roundell*, 2 Moo. & R. 138; *Brain* v. *Preece*, 11 M. & W. 773.

Secondary evidence of a document is only admissible in five cases:—

(i.) Where the original is lost or destroyed, or cannot, for any other reason, be produced in court.

(ii.) Where the original is in the possession of the opposing party who does not produce it after due notice requiring him to do so.

(iii.) Where the original is in the possession of a third person who is out of the jurisdiction and refuses to produce it; or who, being within the jurisdiction, has been duly served with a *subpœna duces tecum*, and yet refuses to produce it.

(iv.) Where the copy has been supplied by one party to the other during the course of the litigation as being a correct copy of a material document in the possession of the former party.

(v.) By virtue of some Act of Parliament or Rule of Court.

It will be seen that the first three of these exceptions rest upon the principle that the party who tenders a copy in evidence has done all that he can reasonably be expected to do to bring the original before the Court. In the first case he must show that he has made a thorough and conscientious search for the missing document; in the second, he must, a reasonable time before the day of trial, give his opponent explicit notice to produce the original; in the third case he must do all in his power to induce the person who holds the original document out of the jurisdiction to forward it for production in court. The fourth case rests upon an entirely different ground, namely, that the conduct of his opponent in supplying him with the document for the purposes of the trial amounts to an admission, if not to an estoppel; and an admission is always evidence against the party making it, even though it relates to

the contents of a written document. The last exception is based upon considerations of public utility and convenience.

(i.) When a party has done every reasonable thing in his power to bring before the Court primary evidence of a document which was in his possession by searching for it without success in places where he would naturally expect to find it, he will then, and not till then, be permitted by the Court to give secondary evidence of its contents. So too where he proves clearly that the original has been destroyed. When a document is alleged to have been destroyed by the opposite party, notice to produce it is necessary (*d*). The sufficiency of the excuse for the non-production of the direct evidence is always for the judge, even when it involves a disputed question of fact (*e*).

The search must be *bonâ fide* and diligent (*f*). If there are several places of probable deposit, all must be searched (*g*). It is not necessary to make every possible search; but every reasonable search must be made (*h*); and the search need not be recent or made for the purposes of the trial (*i*).

Thus, in order to show that reasonable search has been made for a lost indenture, a witness may be asked whether he has inquired of persons who were likely to know about it, and what answers were given to his inquiries (*k*). This is not regarded as hearsay; it is evidence that reasonable search has been made.

(*d*) *Doe* v. *Morris*, 3 A. & E. 46.
(*e*) *Gathercole* v. *Miall*, 15 M. & W. 319.
(*f*) *R.* v. *Denio*, 7 B. & C. 620.
(*g*) *Doe* v. *Lewis*, 11 C. B. 1035.
(*h*) *Hart* v. *Hart*, 1 Hare, 1.
(*i*) *Fitz* v. *Rabbits*, 2 Moo. & R. 60.
(*k*) *R.* v. *Braintree*, 1 E. & E. 51; *R.* v. *Kenilworth*, 7 Q. B. 642.

Where for physical reasons it is impossible or highly inconvenient to produce the original, secondary evidence is admissible. Thus, if it is material to prove the inscription on a tombstone or an escutcheon, or where libellous words have been chalked on a wall, oral evidence may be given of the words, because it is practically impossible to bring the tombstone, escutcheon or wall into court (*l*).

(ii.) Again, if the document on which a party relies was not when last seen or heard of in his own possession, and there is good ground for supposing that it is or was in the possession of his opponent, he must, a reasonable time before the trial, serve upon his opponent or his solicitor an express notice to produce it at the trial (*m*). If at the trial the original is not produced when called for, he may then give secondary evidence of its contents. This is so, although the opponent may have a lawful excuse for refusing to produce it. If, for instance, the opponent succeeds in proving that the document is privileged from production, the first party may put in a copy of that document if he has one, or prove its contents by any other secondary evidence (*n*). But this rule does not apply where the document is privileged from production on the ground of public policy (*o*), nor, it is submitted, when it is written "without prejudice."

The party who claims, under this head, to read a copy

(*l*) *Bruce* v. *Nicolopulo*, 11 Ex. at p. 133; *Mortimer* v. *M'Callan*, 6 M. & W. at p. 68; followed in *Owner* v. *Beehive Spinning Co.*, [1914] 1 K. B. 105.

(*m*) For Notice to Produce, see *post*, p. 589.

(*n*) *Calcraft* v. *Guest*, [1898] 1 Q. B. 759.

(*o*) *Home* v. *Bentinck*, 2 B. & B. 130; *Stace* v. *Griffith*, L. R. 2 P. C. 420; see *ante*, p. 234.

of a document must, in the first place, call on the opponent to produce the original. If it be not produced, he must then prove that the document is in the possession of the opponent. This he can easily do if it has been included in the latter's affidavit of documents. Next, he must prove that he gave the opponent notice to produce the original and that the notice was served a reasonable time before trial. Lastly, he must prove that the document which he now tenders in evidence is a true copy of the original. Then he will be entitled to have it read to the jury.

Where a prisoner was indicted for arson with intent to defraud a fire office, it was held that secondary evidence of the policy was inadmissible, as due notice had not been given to produce it (*p*).

But in an action to recover a written document, oral evidence of its contents may be given, without previous notice to produce it. The writ in the action is a sufficient notice (*q*).

A solicitor may be asked whether he has papers of his client in court; and if by his answer, which is compulsory, he admits the fact, secondary evidence of their contents may be given if the originals are not produced (*r*). If a solicitor be subpœnaed to produce a document which he holds for a client, he may, in his discretion, refuse to produce it or answer any question as to its contents; and the judge ought not to examine it to ascertain whether it ought to be withheld (*s*).

Where a solicitor had been subpœnaed to produce a deed which, at the trial, he refused to produce by the express instruction of his client, the party by whom he was subpœnaed then called another witness to give secondary evidence of the deed, by means of a copy. The second witness stated that he had a copy of a deed,

(*p*) *R.* v. *Kitson*, Dears. 187; cf. *R.* v. *Elworthy*, L. R. 1 C. C. R. 103.
(*q*) *Jolly* v. *Taylor*, 1 Camp. 143.
(*r*) *Dwyer* v. *Collins*, 7 Ex. 639.
(*s*) *Volent* v. *Soyer*, 13 C. B. 231.

but that he did not know whether it was a copy of the deed in question unless he was suffered to look at the deed. It was then suggested that he should be allowed to look at the names of the parcels and the parties to the deed, in order to identify it. The first witness still objected, and it was also contended on the opposite side, that the first witness's client ought to have been called to show that he had given the prohibition, and that all sources of primary evidence had been exhausted. The judge, however, ordered that the second witness should be allowed to look at the indorsement of the deed; and when the latter had thus identified it, the judge received the copy as secondary evidence. An application for a new trial was made, on the ground that this evidence was improperly admitted; but the Court upheld the ruling of the judge on both points (*t*).

A solicitor who was a witness to a deed is bound to disclose what takes place at the time of its execution (*u*).

(iii.) If the original document be in the possession of a third person within the jurisdiction who is a stranger to the cause and who refuses to produce it, although duly served with a *subpœna duces tecum* for the purpose, then the right to give secondary evidence of its contents appears to depend on whether such refusal be rightful or wrongful. If it be a wrongful refusal, then it is said the remedy of the plaintiff is against the witness only (*x*). If it be a rightful refusal, then secondary evidence is, as a rule, admitted, as the plaintiff has done all in his power to produce primary proof (*y*).

But if a material document be in the possession of a person who is beyond the jurisdiction of the

(*t*) *Phelps* v. *Prew*, 3 E. & B. 430; 23 L. J. Q. B. 140.
(*u*) *Robson* v. *Kent*, 5 Esp. 552.
(*x*) *R.* v. *Llanfaethly*, 2 E. & B. 940; Cockle, 317.
(*y*) *Mills* v. *Oddy*, 6 C. & P. 728.

Court and who consequently cannot be compelled to produce it, the party relying upon it may give secondary evidence of its contents, provided he has informed the person outside the jurisdiction of the purpose for which the document is required, and done all in his power to procure the attendance of that person or the presence of that document at the trial.

(iv.) There is another and a somewhat anomalous exception to the rule that secondary evidence is inadmissible where there is primary evidence which ought strictly to be produced. If a material document is in the possession of one party, and he or his solicitor delivers to the opponent a document which he represents to be a true copy of the material document, the copy so supplied is evidence against the party who supplied it, although the original is not produced and although no notice to produce the original has been given. For the conduct of the party in supplying that copy to his opponent amounts to an admission of its accuracy, and to a consent that such copy, being supplied for the purposes of the action, should be used in the action without the necessity for strict proof. And it is not necessary to prove that the original was duly stamped (*a*).

This is an instance of the principle laid down in *Slatterie* v. *Pooley* (*b*). An affidavit of documents or an affidavit in answer to interrogatories made in the action is usually proved in this way—by merely producing the

(*a*) *Stowe* v. *Querner*, L. R. 5 Ex. 155, 159.
(*b*) 6 M. & W. 664. This case will be found discussed in the chapter on Admissions, *post*, p. 384.

copy of the affidavit received from the other side. Such a copy is always indorsed with the name of the deponent's solicitor, whose act in forwarding it to the opponent amounts to an admission that it is a correct copy.

(v.) Lastly, by various Acts of Parliament or rules of Court, certain copies have been made admissible, although the originals are still in existence and could be produced. In some of these cases, however, the copy must be verified by affidavit.

The Documentary Evidence Act, 1845 (*c*), so far as it refers to public documents, is virtually superseded by the Evidence Act, 1851 (*d*).

So, by s. 3 of the Bankers' Books Evidence Act, 1879 (*e*), it is provided that:—

"Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as *primâ facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded,"

and by s. 7 that:—

"On the application of any party to a legal proceeding a Court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the Court or judge otherwise directs."

A magistrate before whom criminal proceedings are pending is a Court within the meaning of the Act, and can therefore make an order under s. 7 (*f*).

It has been held by the Court of Appeal that such an order can be made *ex parte*, but that the judge ought to

(*c*) 8 & 9 Vict. c. 113, s. 1.
(*d*) See *ante*, pp. 215, 216, 225.
(*e*) 42 Vict. c. 11.
(*f*) *R.* v. *Kinghorn*, [1908] 2 K. B. 949.

be careful about so doing (*g*). No evidence is absolutely necessary, but the judge must be satisfied that the entries in question are admissible in evidence in the action, and for this purpose evidence may be required (*h*). An order under this section may be made in England to operate in Scotland or Ireland and *vice versâ* (*i*). The making of an order at all is a matter of discretion with the Court, and an order was refused in an action of libel to defendants, who had stated that the plaintiff was a man of no means and who pleaded justification (*k*). The Act includes "ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank" (*l*). It applies to books in the custody or control of the successors to the bank by whom the entries were made; and a book is "used in the ordinary business of the bank" within the meaning of s. 9 of the Act, if kept for reference, although it may not be in daily use (*m*).

This Act cannot be used to get behind an affidavit of documents. Therefore, where a plaintiff, on making such an affidavit, had sealed up part of her pass books, and sworn that the parts so sealed up were not relevant, an application to order the plaintiff's bankers to produce the entries in their books relating to the plaintiff's account for the inspection of the defendants was refused (*n*). A banker is only exonerated by s. 6 of this Act from personal attendance in Court when he craves the aid of and follows out the provisions of ss. 2—5 (*o*).

By the Revenue, Friendly Societies, and National Debt Act, 1882 (*p*), s. 11 (2), the privileges of the last-mentioned Act are extended to banking companies to which the

(*g*) *Arnott* v. *Hayes*, 36 Ch. D. 731.
(*h*) *Ibid.*
(*i*) *Kissam* v. *Link*, [1896] 1 Q. B. 574.
(*k*) *Emmott* v. *Star Newspaper Co.*, 62 L. J. Q. B. 77.
(*l*) 42 Vict. c. 11, s. 9.
(*m*) *Asylum for Idiots* v. *Handysides*, 22 T. L. R. 573.
(*n*) *Parnell* v. *Wood*, [1892] P. 137; approved by Court of Appeal in *South Staffordshire Tramways Co.* v. *Ebbsmith*, [1895] 2 Q. B. 669.
(*o*) *Emmott* v. *Star Newspaper Co.*, *supra*.
(*p*) 45 & 46 Vict. c. 72.

provisions of the Companies Acts, 1862 to 1880 (now the Companies (Consolidation) Act, 1908 (*q*)), are applicable, provided they have complied with the requirements of the Act under notice.

The principle established by the above Acts applies to the accounts of persons other than the parties to the proceedings (*r*). But the Court must be satisfied by the party asking for the order that the entries are admissible as evidence in the action, and the person whose account is sought to be inspected must be brought before the Court (*s*), before it will make an order under s. 7 of the Act (*t*) for inspection of the accounts of a person not a party to the action. The Court of Appeal has laid down that where the account is the account of a person not a party to and having no interest in the litigation, the Court will take care that the section is not made a means of oppression, and will protect such person against a roving inspection of his account (*u*).

So a banker is bound not to disclose the state of a customer's accounts, except upon a reasonable and proper occasion, and what is a reasonable and proper occasion is a question for the jury (*x*).

Again, by Order XXXI., r. 19A (1) of the Rules of the Supreme Court—

"Where inspection of any business books is applied for, the Court or a judge may, if they or he shall think fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations, or alterations. Provided that, notwithstanding that such copy has been supplied, the Court or a judge may order inspection of the book from which the copy was made."

(*q*) 8 Edw. VII. c. 69.
(*r*) *Howard* v. *Beall*, 23 Q. B. D. 1.
(*s*) *South Staffordshire Tramways Co.* v. *Ebbsmith*, [1895] 2 Q. B. 669; *L'Amie* v. *Wilson*, [1907] 2 Ir. R. 130.
(*t*) 42 Vict. c. 11.
(*u*) *Pollock* v. *Garle*, [1898] 1 Ch. 1.
(*x*) *Hardy* v. *Veasey*, L. R. 3 Ex. 107.

By s. 3 of the Judicature Act, 1894 (*y*), power was given to the Rule Committee of the judges of the High Court to make rules for regulating the means by which particular facts may be proved, and the mode in which evidence thereof may be given (a) on any application in matters relating to the distribution of any fund or property, and (b) on any application upon summons for directions pursuant to the rules. The only rule which has been made under this power is r. 7 of Order XXX., which is that on the hearing of a summons for directions, "the Court or a judge may order that evidence of any particular fact, to be specified in the order, shall be given by statement on oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries or otherwise as the Court or judge may direct.". This rule, which applies to the Chancery Division as well as to the King's Bench Division, embodies the only existing power enabling judges of the High Court to dispense with the technical rules of evidence otherwise than by consent. Apart from this rule the judge has no power to give to secondary evidence the effect of primary. Even the judge charged with commercial business has no further power of dispensing with the technical rules of evidence than any other judge of the High Court (*z*). Thus where an order required a party to admit "a copy of a letter," it was held that the other party could not give it in evidence without first accounting for the non-production of the original (*a*).

(*y*) 57 & 58 Vict. c. 16.
(*z*) *Baerlein* v. *Chartered Mercantile Bank*, [1895] 2 Ch. 488.
(*a*) *Sharpe* v. *Lamb*, 11 A. & E. 805.

CHAPTER X.

REAL EVIDENCE.

We have dealt with the oral evidence of witnesses and also with documentary evidence ; there remains the evidence of things other than documents, which is generally termed Real Evidence.

Whenever a question arises as to the nature, appearance, identity or condition of any physical object, the Court naturally desires that such object should, if possible, be produced for its inspection. The evidence thus addressed directly to the senses of the tribunal is obviously more satisfactory and reliable than verbal descriptions of such an object given by witnesses ; and the non-production of the thing itself is clearly a matter for comment and suspicion if it could have been produced in Court without difficulty.

The law, however, will not in all cases insist upon the production or inspection of an original object with the same strictness as it does in the case of an original document. Nevertheless, whenever a thing is produced, it nearly always requires the oral evidence of some witness to establish its genuineness and materiality, *e.g.*, by explaining what it is, where it was found, and the meaning of the marks upon it, or by calling attention to anything else which indicates the use for which it was intended or to which it has been put.

Real evidence is a very important, and perhaps the oldest and commonest mode of proof, and is abundantly recognised in practice.

Thus identification has been established to the satisfaction of the Court by the production of a bullet which fitted an empty cartridge case; of a portion of a ballad forming the wadding of a pistol, which corresponded with another portion of the same ballad found in the prisoner's possession; and of a portion of a knife blade, found on the prosecutor's premises, which had obviously been broken from a knife in the prisoner's possession (*a*).

Although the coroner's jurisdiction is purely statutory and no statutory provision requires a view of the body, it is universally agreed that omission to view invalidates the inquest (*b*). The view of the body is often of great value in establishing the identity of the deceased.

It has been held, in an action for knowingly keeping a fierce dog, that the dog might be brought into Court and shown to the jury to assist them in judging of its temper and disposition (*c*). But now, by s. 1 (2) of 6 Edw. VII. c. 32, where any injury has been done by a dog, "the occupier of any house or premises where the dog was kept or permitted to live or remain at the time of the injury shall be presumed to be the owner of the dog, and shall be liable for the injury unless he proves that he was not the owner of the dog at that time."

The photograph of a picture was produced in an action for infringement of the copyright in the picture (*d*); and it is common practice to lay before the Court photographs (*e*), plans, models, and the like, for inspection.

Another instance of "real evidence" is afforded by the

(*a*) See Thayer, Cases on Evidence, 720; Wills on Circumstantial Evidence, p. 166 *et seq.*; Hale, Pleas of the Crown, I., 635.

(*b*) See *R.* v. *Clerk*, 1 Salk. 377; *R.* v. *Vaughan*, 13 How. St. Tr. 517; *R.* v. *Ferrand*, 3 B. & Ald. 260; and *R.* v. *Ingham*, 5 B. & S. 257.

(*c*) *Line* v. *Taylor*, 3 F. & F. 731.

(*d*) *Lucas* v. *Williams & Sons*, [1892] 2 Q. B. 113.

(*e*) See *M'Cullough* v. *Munn*, [1908] 2 Ir. R. 194.

rule requiring witnesses to give their evidence in open Court. Their demeanour and conduct under examination is frequently a valuable aid in arriving at the truth and understanding the matter in issue.

The Court may, to some extent, judge from inspection of the age, not only of things, but of persons. This matter is particularly dealt with in some cases by statute. Thus, the Summary Jurisdiction Act, 1879, provides that the expression "child" when used therein means a person who "in the opinion of the Court before whom he is brought" is under twelve (*f*). The Prevention of Cruelty to Children Act, 1904, provides that where it is alleged that a child is under any specified age and "appears to the Court" to be under that age, he shall be deemed to be under that age, unless the contrary is proved (*g*); and the Children Act, 1908, contains a similar provision (*h*). So the Criminal Justice Administration Act, 1914 (*i*), gives special powers to Justices of the Peace when "it appears to the Court that the offender is not less than sixteen nor more than twenty-one years of age."

Real evidence, however, like documentary, generally requires to be supported by the oral evidence of some witness. The mere production of a thing does not make clear to the Court its materiality and significance. Thus, if a bullet and pistol be produced, they of themselves tell nothing; witnesses must be called to prove that the pistol was found in the pocket of the prisoner and the bullet in the heart of the murdered man; then it is material to show by actual demonstration in Court, before the jury, that the bullet fits the pistol.

There are many physical objects with respect to which the Court cannot form a correct opinion by unaided inspection. In many cases it requires the help of expert witnesses. Thus, it may be necessary to have expert witnesses to explain to the Court the appearance of a

(*f*) 42 & 43 Vict. c. 49, s. 49.
(*g*) 4 Edw. VII. c. 15, s. 17.
(*h*) 8 Edw. VII. c. 67, s. 123.
(*i*) 4 & 5 Geo. V. c. 58, s. 10 (1) (a).

wound, the identity of, or difference between, samples of goods, or handwriting, and such matters. But, in all such cases, the articles should be produced to the jury, so that they may understand and test the reasons and opinions given by the expert witnesses. It seems that a judge may not decide a case merely upon his own inspection, without further evidence. In *L. G. Omnibus Co.* v. *Lavell* (*k*), an omnibus proprietor sought to restrain another omnibus proprietor from running omnibuses so painted as to be calculated to deceive passengers into the belief that they were the plaintiff's omnibuses. The judge himself viewed the two omnibuses, and then stated that he was satisfied upon the evidence of his own eyesight alone that the defendant's omnibus was so painted and lettered as to be calculated to deceive passengers. It was held on appeal that the judge must be satisfied by independent evidence, and could not grant an injunction on his own view only.

Nevertheless, production of physical objects is not, as a rule, compulsory or legally required. This is so even though the object in question contain or bear upon it words or inscriptions material to the case, so long as it does not come within the legal idea of a "document" (in which case, as we have seen, the document must be produced or its absence accounted for). Thus, in the well-known case of *R.* v. *Hunt* (*l*), on an indictment for conspiracy, certain flags and banners, bearing inscriptions and devices of a seditious and inflammatory tendency, were not produced, but were described by witnesses from memory. It was objected that such flags and banners should have been produced, but ABBOTT, C.J., said:—

"I think it was not necessary either to produce the flags or to give notice to the defendants to produce them. The cases requiring the

(*k*) [1901] 1 Ch. 137; and see observations on this case, *per* FARWELL, J., in *Bourne* v. *Swan*, [1903] 1 Ch. 211; and *Royal Warrant Holders' Association* v. *Edward Deane & Beal, Ltd.*, [1912] 1 Ch. 10.

(*l*) 3 B. & Ald. 566.

production of a writing itself will be found to apply to writings of a very different character. There is no authority to show that in a criminal case, ensigns, banners, or other things exhibited to public view, and of which the effect depends upon such public exhibition, must be produced or accounted for on the part either of the prosecutor or of the defendants. And in many cases the proof of such matters from eye-witnesses, speaking to what they saw on the occasion, has been received, and its competency was never, to my knowledge, called in question until the present time. Inscriptions used on such occasions are the public expression of the sentiments of those who bear and adopt them, and have rather the character of speeches than of writings. If we were to hold that words inscribed on a banner so exhibited could not be proved without the production of the banner, I know not upon what reason a witness should be allowed to mention the colour of the banner or even to say that he saw a banner displayed, for the banner itself may be said to be the best possible evidence of its existence and its colour. . . . It will, however, be a matter of observation to the jury that the prosecutor chose to offer only the fallible testimony of witnesses where he had it in his power to produce the infallible testimony of the things themselves."

It may be difficult indeed in some cases to determine whether a particular physical object with words upon it is a document or not. An object without any words or writing on it may apparently be a document, *e.g.*, pieces of wood on which bakers, milkmen, and others used to indicate by mere notches the number of loaves or quarts of milk delivered; and exchequer tallies, indicating by notches the amount of money paid (*m*). But, once establish that the object in question is not a document, then the rule applies that production is not strictly necessary.

In the case of *R.* v. *Francis* (*n*), where the prisoner was charged with obtaining money by the false pretence that a ring was a diamond ring, and evidence was offered to the effect that he had on another occasion attempted to obtain money by the false pretence that another ring was a diamond ring, it was objected that such other ring ought to have been produced. But Lord COLERIDGE, C.J., said:—

"Though the non-production of the article may afford ground for observation more or less weighty, according to circumstances,

(*m*) See Best, Ev., 11th edition, p. 210, n.
(*n*) L. R. 2 C. C. R. 128.

it only goes to the weight, not to the admissibility of the evidence, and no question as to the weight of this evidence is now before us. Where the question is as to the effect of a written instrument, the instrument itself is primary evidence of its contents, and until it is produced, or the non-production is excused, no secondary evidence can be received. But there is no case whatever deciding that, when the issue is as to the state of a chattel, *e.g.*, the soundness of a horse, the production of the chattel is primary evidence, and that no other evidence can be given till the chattel is produced in Court for the inspection of the jury. The law of evidence is the same in criminal and civil suits."

The non-production, however, of a material physical object, where such production is possible, is ground for suspicion or comment. Thus, in the well-known case of *Armory* v. *Delamirie* (*o*), where a chimney-sweeper's boy who had found a jewel sued a goldsmith for detaining it, Pratt, C.J., directed the jury that, as the defendant did not at the trial produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages; and the jury accordingly did so.

But no suspicion can of course arise where it is physically impossible to produce the original object in Court, as, for instance, where a question has arisen concerning buildings, walls, boundaries, rights of way, or locality. To meet such cases provision has been made for inspection or view, even before trial, both in criminal cases and in civil cases (*p*), whether depending in the High Court (*q*) or in the County Court (*r*). Apart from such provision there is apparently jurisdiction at common law to adjourn the Court during a trial in order to allow the jury to view the property (*s*), even after the judge has summed up (*t*). This matter is more particularly dealt with later (*u*). But whether the judge or jury

(*o*) 1 Strange, 504.
(*p*) 6 Geo. IV. c. 50, s. 23.
(*q*) R. S. C., Order L., rr. 3—5.
(*r*) C. C. Rules, Order XII., rr. 3, 4.
(*s*) *R.* v. *Whalley*, 2 Car. & K. 376.
(*t*) *R.* v. *Martin*, L. R. 1 C. C. R. 378.
(*u*) See *post*, p. 571.

has viewed the premises or not, secondary evidence is always admissible as to the condition of any immovable property.

Thus, the report of a surveyor will be received as to the state of repair of a house; and anyone may inform the Court what words have been carved or inscribed upon a tombstone or a wall (*x*). So models, maps, and plans are constantly produced in Court and proved to be correct by the persons who made them (*y*). They are then secondary real evidence.

(*x*) *Bruce* v. *Nicolopulo*, 11 Ex., at p. 133; *Mortimer* v. *M'Callan*, 6 M. & W. at p. 68.

(*y*) See *Hayes* v. *Brown*, [1920] 1 K. B. 250.

CHAPTER XI.

PRESUMPTIONS.

THE law, as we have seen, does not require that all facts should be strictly proved or proved up to the hilt. The burden of proof in Court is often lightened by—

(i.) Presumptions,

(ii.) Admissions, and

(iii.) Estoppels.

These will be dealt with in this and the two following chapters.

A presumption is an inference as to a matter of fact which a judge draws, or directs a jury to draw, as a matter of law.

Suppose that in order to entitle him to judgment, the plaintiff in a given case must establish four facts to the satisfaction of the jury. As a general rule, he will have to call some evidence in proof of each separate fact. But it sometimes happens that as soon as he has proved, say, three of these facts the law will infer the existence of the fourth fact, which then need not be expressly proved. This presumption is rebuttable ; that is, the other side may try to disprove it. Yet if they cannot do this, the law treats the fact presumed as proved. The presumption is not conclusive, but it shifts the burden of proof.

The word "presumption" in the older books is used in a much wider sense. It included two other kinds of inference, in addition to that defined above. It was usual to divide "presumptions" into three classes :—

(i.) Presumptions of fact (*præsumptiones facti vel naturæ*).

(ii.) Rebuttable presumptions of law (*præsumptiones juris*), the class defined above.

(iii.) Irrebuttable presumptions of law (*præsumptiones juris et de jure*).

But a presumption of fact is nothing more than an argument more or less cogent; it is an inference of one fact drawn from other facts. It is for the jury to draw that inference or not as they think fit; they are not bound as a matter of law to draw it. It is the duty of the judge, when there is no evidence from which a reasonable man would honestly draw that inference, to withdraw that question from the jury; but if there is any evidence upon the matter, he must leave it to the decision of the jury. If they do draw the inference, their verdict will not be disturbed; but equally it will not be disturbed if they decline to draw it.

On the other hand, a *presumptio juris et de jure* is no presumption at all; it is simply an indisputable proposition of law. For example, the rule that a child under seven cannot commit a crime is a rigid rule of law—in fact, part of the definition of a crime—and no evidence of any fact can be given to contradict it.

The Legislature frequently enacts that certain matters are "to be deemed" to be conclusive evidence of other facts; in such cases there is no presumption, it is a matter of positive law (*a*). In other cases, however, the Legislature is content to enact that a certain thing "shall be deemed" to have occurred unless and until the contrary be proved (*b*); and here we have that

(*a*) See, for instance, the definition of an unsafe ship in s. 439 of the Merchant Shipping Act, 1894.

(*b*) For an instance of evidence made by statute "sufficient," though probably not conclusive, see *The Board of Trade* v. *The Sailing Ship Glenpark, Ltd.*, [1904] 1 K. B. 682.

rebuttable presumption of law, which in a law book alone deserves the name of "presumption." In this work the word "presumption" is invariably used to denote what the older writers would have called a *presumptio juris*, that is, a rebuttable presumption of law.

A presumption of law must be distinguished from *primâ facie* evidence of a fact. The latter serves, no doubt, to shift the burden of proving that fact to this extent, that the judge or jury wish now to hear what the other side has to say on the matter. Suppose that the person on whose behalf they now expect to hear evidence given should offer none, but content himself with merely criticising the evidence already given by his opponent, pointing out its weak places, and showing how far it is from being conclusive of the issue. It will then be open to the jury to find a verdict for either party; whereas a presumption is an inference which they must draw as a matter of law, and is conclusive, unless the party against whom the presumption arises gives evidence sufficient to rebut it.

Take, for instance, a matter to which we have already called attention (*c*), the inferences which arise in connection with the posting of letters (*d*). As soon as it has been established that a letter properly addressed to A. was posted, with the postage prepaid, juries are in the habit, and rightly in the habit, of taking it for granted that A. received that letter, unless A. can satisfy them that he did not. Such *primâ facie* evidence will as a matter of fact shift the burden of proof to A., but it

(*c*) See *ante*, pp. 129, 130.
(*d*) As to post-marks, see *post*, p. 338.

does not raise any presumption of law (*e*). Even if A. called no evidence, it would nevertheless be open to the jury to disbelieve the evidence already given and find that they were not satisfied that A. ever received the letter.

But in two or three instances the Legislature has not been content to leave the matter thus. It has thought fit to raise that which is usually merely *primâ facie* evidence to the level of a presumption of law. Thus, by s. 26 of the Interpretation Act, 1889—

"Where an Act passed after the commencement of this Act authorises or requires any document to be served by post, whether the expression 'serve,' or the expression 'give' or 'send,' or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

And in at least one case the Legislature has raised it to the rank of conclusive evidence (*presumptio juris et de jure*), for by s. 329 of the Lunacy Act, 1890—

"Where any person is proceeded against under this Act on a charge of omitting to transmit or send any copy, list, notice, statement, report or other document required to be transmitted or sent by such person, the burden of proof that the same was transmitted or sent within the time required shall lie upon such person; but if he proves by the testimony of one witness upon oath that the copy, list, notice, statement, report or document in respect of which the proceeding is taken was properly addressed and put into the post in due time, or (in the case of documents required to be sent to the commissioners or a clerk of the peace or a clerk to guardians) left at the office of the commissioners or of the clerk of the peace or clerk to guardians, such proof shall be a bar to all further proceedings in respect of such charge."

Again, where a tenant produces a receipt for rent due at a certain date, it is highly probable that he has paid all rent which accrued before then, and very strong evidence is needed to rebut the inference in this and all other cases of periodical payments: yet there is no presumption of law. But in the special case of the sale of a lease the production by the vendor of the

(*e*) See *ante*, pp. 145 *et seq.*

receipt for the last rent due is by statute made conclusive evidence that the covenants have been duly performed and the previous rent paid, unless the purchaser can show that in fact the covenants have been broken or the rent not paid (*f*).

And, similarly, the mere fact that one person has paid sums of money at regular intervals to another person raises no presumption as to the title of that other to such payments. But here again the Legislature has, in one instance, raised the inference to the rank of a presumption, for by s. 5 (2) of the Charitable Trusts Recovery Act, 1891 (*g*)—

"Where any yearly or other periodical payment has been made in respect of any land, to or for the benefit of any charity or charitable purpose, for twelve consecutive years, such payment shall be deemed, subject to any evidence which may be given to the contrary, *primâ facie* evidence of the perpetual liability of such land to such yearly or other periodical payment, and no proof of the origin of such payment shall be necessary."

There is one case in which that which is really only *primâ facie* evidence of a fact has been sometimes raised almost to the level of a presumption of law, viz., the inference drawn from recent possession of stolen articles. When a man is charged with stealing goods or receiving them knowing them to have been stolen and, after proof has been given of the theft, it is shown that the prisoner had the goods in his possession soon after the theft, there is so strong a likelihood that the prisoner stole or received them that the jury is justified in convicting him, without any other evidence, unless he shows that he came by them in an honest and lawful manner (*h*). But they are not bound to do so. There is no presumption of law to that effect. In such a case the jury should be directed that they may, not that they must, find a verdict of guilty if no reasonable explanation is given (*i*). The

(*f*) Conveyancing Act, 1881, s. 3 (4); *In re Highett and Bird*, [1903] 1 Ch. 287.
(*g*) 54 Vict. c. 17.
(*h*) *R.* v. *Langmead*, L. & C. 427.
(*i*) *R.* v. *Abramovitch*, 112 L. T. 480.

onus of proof still remains on the prosecution (*k*). The strength of the inference depends upon the length of time which has elapsed and the nature of the goods which have been stolen. Thus, some classes of goods pass readily from hand to hand, and in a day or two may have been acquired by someone who knows nothing whatever of the theft, while others are not readily saleable, and even after the lapse of a considerable time it is extremely likely that the person who has them was guilty of larceny or receiving.

We will now deal with the presumptions which arise most frequently in practice.

Presumption of Regularity.

There is a well-known maxim of our law, "*omnia præsumuntur rite esse acta*": this is an inference of reasonable probability arising out of the experience of mankind. The law assumes that any act done in public or any formal act privately performed will be done in due form by the person authorised to do it (*l*).

Thus, there is a presumption that a public officer acting in execution of a public trust will do his duty (*m*); and therefore it is presumed that all who act as justices of the peace, or as constables, have been duly appointed (*n*). Proof that a man had acted as constable is sufficient evidence that he was a constable, even on a trial for his murder, when the offence would have been only manslaughter if he had not been a constable (*o*). On an indictment for having committed perjury before a

(*k*) *R.* v. *Badash*, 118 L. T. 179; *R.* v. *Hamilton*, 118 L. T. 180.

(*l*) See the judgments of the C. A. in *Harris* v. *Knight*, 15 P. D. 170.

(*m*) *Per* Lord ELLENBOROUGH, in *R.* v. *Verelst*, 3 Camp. at p. 433; *per* COLERIDGE, J., in *R.* v. *Whiston*, 4 A. & E. at p. 611; and *per* BLACKBURN, J., in *Waddington* v. *Roberts*, L. R. 3 Q. B. 579.

(*n*) *Berryman* v. *Wise*, 4 T. R. 366; Cockle, 31.

(*o*) *R.* v. *Gordon*, 1 Leach, 515.

surrogate of an Ecclesiastical Court, proof that the person who administered the oath acted as surrogate has been held sufficient *primâ facie* evidence that he has been duly appointed, and had authority to administer the oath (*p*). This presumption has been adopted by the Legislature in the case of excise (*q*) and custom house officers (*r*). The rule does not apply to *private* appointments, such as tithe collectors, or a town clerk (*s*); in these cases the appointments must be proved.

Private documents, such as a deed, bill of exchange, or promissory note, are presumed to have been made or executed at the time when they bear date (*t*), and this extends even to letters (*u*). And a document purporting to be a deed has been presumed to be duly sealed, although only a signature appeared (*x*). Where indentures of a pauper's apprenticeship would have been invalid, if not executed in conformity with the rules of the Poor Law Commissioners, and there was no evidence to show that their regulations had been observed, it was held that, in the absence of any evidence to the contrary, it must be presumed that the regulations had been observed (*y*). So, generally, the orders of justices will be presumed to have been made in accordance with all statutory formalities (*z*). Thus, when to prove a parish apprenticeship secondary evidence of a lost indenture was admitted, it was presumed that the indenture had been executed according to all the requisites of the statute 56 Geo. III. c. 139, because there was evidence that an arrangement for the apprenticeship had been made before justices, and that an

(*p*) *R.* v. *Verelst*, 3 Camp. 432.
(*q*) 7 & 8 Geo. IV. c. 53, s. 17.
(*r*) 16 & 17 Vict. c. 107, s. 307.
(*s*) *R.* v. *Mayor of Stamford*, 6 Q. B. 433.
(*t*) *Malpas* v. *Clements*, 19 L. J. Q. B. 435; *Anderson* v. *Weston*, 6 Bing. N. C. 296; Bockle, 332.
(*u*) *Goodtitle* v. *Milburn*, 2 M. & W. 853; *Hunt* v. *Massey*, 5 B. & Ad. 902.
(*x*) *In re Sandilands*, L. R. 6 C. P. 411.
(*y*) *R.* v. *St. Mary Magdalen*, 2 E. & B. 809.
(*z*) *Williams* v. *Eyton*, 4 H. & N. 357.

apprenticeship had subsequently existed (*a*); but it seems that it would be otherwise where there is no such evidence (*b*). In similar cases it has been held that the law will presume that which accounts reasonably for an existing state of things; and therefore the fact that a person served an apprenticeship raises a presumption that he was duly bound an apprentice (*c*). When a rate has been made, it will be presumed to have been duly made (*d*).

If a date and hour and the name of a place appear on a telegram or on a post-mark, it will be presumed that the telegram was sent or the letter posted at the time and place indicated (*e*). The meaning of such postal marks may be explained to the Court by a post office official, or, indeed, by anyone who is familiar with the practice of the post office (*f*).

The fact of a marriage having taken place before a registrar in a chapel raises the presumption that the chapel was properly registered, and the marriage legal (*g*); and, in support of a plea of coverture, a certificate of the defendant's marriage in a Roman Catholic chapel according to the rites of that Church, with evidence of subsequent cohabitation, was held to be *primâ facie* proof of a valid marriage under the statute 6 & 7 Will. IV. c. 85 (*h*). In short, wherever a marriage has been solemnized, the law strongly presumes that all legal requisites have been complied with (*i*); and the fact of the ceremony of marriage having been performed by a clergyman in a place where divine service has been performed raises the presumption that the place was duly

(*a*) *R.* v. *Broadhempston*, 1 E. & E. 154.
(*b*) *R.* v. *Stonehouse*, 10 Q. B. 234.
(*c*) *R.* v. *Fordingbridge*, E. B. & E. 678.
(*d*) *R.* v. *Reynolds*, [1893] 2 Q. B. 75.
(*e*) *R.* v. *Johnson*, 7 East, 65; *Warren* v. *Warren*, 1 C. M. & R. 250.
(*f*) *Linzee* v. *Linzee*, 29 L. J. P. & M. 128; *Abbey* v. *Lill*, 5 Bing. 299; see further, *ante*, pp. 43, 129, 130.
(*g*) *R.* v. *Mainwaring*, Dears. & B. 139.
(*h*) *Sichel* v. *Lambert*, 15 C. B. (N.S.) 781; cf. *De Thoren* v. *Attorney-General*, 1 App. Cas. 686.
(*i*) *Smith* v. *Huson*, 1 Phillimore, at p. 294.

licensed for marriages (*k*). A foreign marriage is presumed to have been celebrated with the due solemnities required by the law of the place where it is celebrated (*l*).

The maxim *Omnia præsumuntur rite esse acta* is applied by the Courts to the execution both of deeds and of wills (*m*). Where all the witnesses are dead, and the handwriting of one of them is proved, the statement in the attestation clause will be presumed to be correct (*n*). A Court of Probate goes further than this, and presumes that all formalities have been complied with in respect of a will when the attestation clause is in the usual form (*o*). When there is no attestation clause, or when it is not in the usual form, Courts of law will, it seems, nevertheless presume compliance with all formalities in respect of a will (*p*), and the tendency of a Court of Probate will be to give effect to the testator's intentions (*q*). Of course the evidence of the attesting witnesses may rebut the presumption of due execution (*r*); but when a will appears on the face of it to have been duly attested, and surrounding circumstances imply that this was so, the contrary evidence of one attesting witness will not rebut the presumption of due execution (*s*). Where the recollection of the attesting witnesses is imperfect, but the undisputed facts, the probabilities of the case, and the *evidentia rei*, are in favour of due execution, such execution will be presumed (*t*). It may here be remarked that when a will is traced to the custody of the testator and is not forthcoming, then, in the absence of other

(*k*) *R.* v. *Cresswell*, 1 Q. B. D. 446.
(*l*) *R.* v. *Brampton*, 10 East, 202.
(*m*) *In re Sandilands*, L. R. 6 C. P. 411.
(*n*) *Adam* v. *Kerr*, 1 B. & P. 360; *Andrew* v. *Motley*, 12 C. B. (N.S.) 526.
(*o*) *Vinnicombe* v. *Butler*, 3 Sw. & Tr. 580; *In the Estate of Phibbs*, [1917] P. 93.
(*p*) *Spilsbury* v. *Burdett*, 10 Cl. & F. 840.
(*q*) *In the Goods of Rees*, 34 L. J. P. M. & A. 56.
(*r*) *Croft* v. *Croft*, 34 L. J. P. M. & A. 44.
(*s*) *Wright* v. *Rogers*, L. R. 1 P. & D. 678; cf. *In the Goods of Jane Thomas*, 1 Sw. & Tr. 255.
(*t*) *Wright* v. *Sanderson*, 9 P. D. 149; *Whiting* v. *Turner*, 89 L. T. 71; and see *Pilkington* v. *Gray*, [1899] A. C. 401.

evidence, it will be presumed that the testator destroyed it *animo revocandi* (*u*). This presumption may be rebutted by the facts, and will be more or less strong according to the character of the custody which the testator had over the will (*x*). Clear evidence will be needed to satisfy the Court that it was not destroyed by the testator *animo revocandi* (*y*). Again, where signing and sealing are proved, the Courts will presume the delivery of a deed (*z*). So it will be presumed that an instrument lost or not produced after notice was duly stamped (*a*); unless there is evidence that it remained without a stamp for some time after the execution, in which case the *onus* is shifted, and lies upon the party who tenders the document (*b*). If an instrument is produced bearing adhesive stamps, properly cancelled, it will be presumed they were affixed at the proper time (*c*).

The fact that a person is in possession of land raises a presumption that he has a freehold interest in it, and valid livery of seisin will be presumed where necessary (*d*). Where however a deed more than thirty years old, which purported to exercise a power of appointment, was executed by the appointors by attorney, it was held that it could not be presumed that the attorney was properly appointed *ad hoc* (*e*); but this decision was based on the rule as to delegating discretionary powers, and is, therefore, not one of general application.

With regard to alterations in documents, the general rule is, that the party producing an altered document in evidence must explain the alteration; but in the case of deeds and all documents which it is an offence to alter

(*u*) *Welch* v. *Phillips*, 1 Moo. P. C. 299.
(*x*) *Per* COCKBURN, C.J., in *Sugden* v. *Lord St. Leonards*, 1 P. D. 218. In that case the presumption was rebutted.
(*y*) *Allan* v. *Morrison*, [1900] A. C. 604.
(*z*) *Hall* v. *Bainbridge*, 12 Q. B. 699.
(*a*) *R.* v. *Long Buckley*, 7 East, 45.
(*b*) *Marine Investment Co.* v. *Haviside*, L. R. 5 H. L. 624.
(*c*) *Bradlaugh* v. *De Rin*, L. R. 3 C. P. 286.
(*d*) *Peaceable* v. *Watson*, 4 Taunt. 16; Cockle, 200; *Ecclesiastical Commissioners* v. *Treemer*, [1893] 1 Ch. 166, 172.
(*e*) *In re Airey*, [1897] 1 Ch. 164.

after completion, there is a presumption that alterations, if any, were made before execution in the one case, and before completion, in the other (*f*). In the case of a will the presumption is that an alteration was made after execution (*g*); but Lord PENZANCE has stated that there is a marked distinction between interlineations and alterations, and in a case of interlineations (*h*) he held that, having regard to the internal evidence of the document itself, he was not bound to presume they were made after execution. There is no presumption that blanks filled up in different ink were so filled up after execution (*i*). In the case of bills of exchange and promissory notes, s. 64 of the Bills of Exchange Act, 1882 (*k*), enacts as follows:—

"(1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers. Provided that, where a bill has been materially altered, but the alteration is not apparent and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour. (2) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent."

This section includes promissory notes; the word "apparent" in the section has been held (*l*) not to be limited to that which is apparent to all mankind, but includes those cases in which the party sought to be bound can at once discern, from some incongruity on the face of the bill or note, and point out to the holder, that it is not what it was, *i.e.*, that it has been materially altered. The *onus* of proving the time when an alteration was made lies on a person suing on a bill of exchange

(*f*) *Doe* v. *Catomore*, 16 Q. B. 745; Cockle, 336.
(*g*) *Cooper* v. *Bockett*, 4 Moo. P. C. 419; *Doe* v. *Palmer*, 16 Q. B. 747.
(*h*) *In the Goods of Cadge*, L. R. 1 P. & D. at p. 545.
(*i*) See *Greville* v. *Tylee*, 7 Moo. P. C. 327.
(*k*) 45 & 46 Vict. c. 61.
(*l*) *Leeds and County Bank* v. *Walker*, 11 Q. B. D. 84.

where the time of alteration is material (*m*). An alteration in the number on a Bank of England note avoids the note (*n*).

So, if a document which requires a stamp be lost or destroyed or is not produced after notice, the Court will, in the absence of any evidence to the contrary, presume that it was properly stamped, and allow a copy to be put in (*o*).

It will be presumed that no appeal has been entered against a judgment or a conviction till the contrary is shown (*p*). As long as either of them stands it cannot be controverted by evidence and is conclusive against every one against whom it is producible (*q*).

The presumption in favour of wedlock is another instance of the rule *Omnia præsumuntur rite esse acta.* It has its own special maxim: *Semper præsumitur pro matrimonio.* "By the law of England . . . where a man and woman have long lived together as man and wife, and have been so treated by their friends and neighbours, there is a *primâ facie* presumption that they really are and have been what they profess to be" (*r*).

As was said by Lord LYNDHURST in *Morris* v. *Davies* (*s*), and approved by Lord COTTENHAM in *Piers* v. *Piers* (*t*), this presumption of law is not lightly to be repelled, and the evidence for repelling it must be strong, distinct, satisfactory and conclusive. It is not to be broken in upon or shaken by a mere balance of probability. Cohabitation as man and wife is therefore presumptive evidence of marriage, except in the cases of prosecutions

(*n*) *Johnson* v. *Duke of Marlborough*, 2 Stark. 313.
(*n*) *Suffell* v. *Bank of England*, 9 Q. B. D. 555; but see *In re Howgate and Osborn's Contract*, [1902] 1 Ch. 451.
(*o*) *Hart* v. *Hart*, 1 Hare, 1; *Crisp* v. *Anderson*, 1 Stark. 35. For other presumptions as to stamps, see *ante*, p. 256.
(*p*) 24 & 25 Vict. c. 96, s. 112.
(*q*) See *Fawcett* v. *Fowlis*, 7 B. & C. 394; *Strickland* v. *Ward*, 7 T. R. 633; *Bynoe* v. *Bank of England*, [1902] 1 K. B. 470.
(*r*) *Per* Lord CRANWORTH in *The Breadalbane Case*, L. R. 1 H. L. Sc. at p. 199.
(*s*) 5 Cl. & F. 163.
(*t*) 2 H. L. Cas. at p. 362.

for bigamy and cases for divorce or damages for adultery (*u*). Lord ELDON held that in cases of cohabitation the presumption is in favour of its legality (*x*), and this is particularly so after a long interval of time, and even where it commenced with a ceremony which was known by both parties to be invalid (*y*).

It is not necessary that the reputation of the neighbourhood should be uniformly and consistently in favour of the marriage (*z*). From 1856 to 1866 a man and woman lived together as man and wife and had five children. There was evidence that they had been treated as man and wife by friends and neighbours, and that their children had been recognised by the head of the father's family. In 1866 the woman left the man, who in 1874, while she was still alive, married another woman. In 1904 the question of the legitimacy of the children was raised, and it was held that the presumption in favour of the marriage having taken place had been established (*a*).

The law also presumes strongly in favour of the legitimacy of children. A child born after marriage, of which the wife was pregnant at the time of the marriage, is presumed to be the child of the husband, and so every child born subsequent to the marriage will be presumed to be the child of the husband. But the conduct of the parties and the surrounding circumstances taken together may be strong enough to raise an irresistible conclusion that the child born was not the child of the husband, but of another (*b*). The evidence to rebut the presumption must be strong, distinct, satisfactory and

(*u*) *Morris* v. *Miller*, 4 Burr. 2057; Cockle, 91; see *R.* v. *Wilson*, 3 F. & F. 119.

(*x*) *Cunninghame* v. *Cunninghame*, 2 Dow (H. L.) 507; *Piers* v. *Piers*, 2 H. L. Cas. 331.

(*y*) See *De Thoren* v. *Attorney-General*, 1 App. Cas. 686; *George* v. *Thyer*, [1904] 1 Ch. 456; *Haynes* v. *Carter*, 94 L. T. 431.

(*z*) *Lyle* v. *Ellwood*, L. R. 19 Eq. 98.

(*a*) *In re Thompson*, 91 L. T. 680.

(*b*) *Per* Lord BLACKBURN, in *The Aylesford Peerage Case*, 11 App. Cas. 1.

conclusive (*c*), for the presumption is one which is not lightly to be repelled (*d*). It is sometimes rebutted by evidence from which non-access is inferred, and non-access will be presumed after the date of a divorce or of a decree for judicial separation, or of an order authorising the wife to refuse to cohabit with her husband (*e*). Neither husband nor wife can give evidence of non-access during marriage in order to bastardise a child.

Presumption of Lawful Origin.

Where certain acts have for a long time been done openly, and yet nobody has raised objection or tried to stop them, the law will strive to find a lawful origin for that user. Lord ELLENBOROUGH said that he would, if necessary, presume a hundred lost grants whenever people have for a long period of time been doing something which they would have no right to do, unless they had a deed of grant.

But to create a presumption of a lost grant, the user must be long, open, and notorious, and of such a kind as a grant could render lawful (*f*).

It is a well-settled principle of English law that, when there has been long-continued possession or assertion of a right, the right should be presumed to have had a legal origin, if such a legal origin was possible (*g*), and that the Courts will presume that those acts were done and those circumstances existed which were necessary to

(*c*) *Per* Lord LYNDHURST, in *Morris* v. *Davies*, 5 Cl. & F. 163.

(*d*) For cases in which the presumption was repelled, see *Hawes* v. *Draeger*, 23 Ch. D. 173; *Bosvile* v. *Attorney-General*, 12 P. D. 177; and *The Poulett Peerage Case*, [1903] A. C. 395.

(*e*) *Hetherington* v. *Hetherington*, 12 P. D. 112; and see *ante*, p. 174.

(*f*) *Attorney-General* v. *Antrobus*, [1905] 2 Ch. 188.

(*g*) *Johnson* v. *Barnes*, L. R. 8 C. P. 527.

the creation of a valid title (*h*). Therefore, on proof of long enjoyment of a pew, coupled with acts which would have been illegal unless there had been a faculty, a faculty was presumed (*i*). So, acts which would only be lawful on the assumption that the person who did them had a several fishery, will, if continued for a sufficient period, justify the presumption that such acts had a lawful origin at a period at which the law permitted such a right to be created (*k*). So in favour of a person who has been in long and peaceable possession, conveyances (*l*), royal grants (*m*), and even Acts of Parliament will be presumed; but in the case of Acts of Parliament this rule appears to be restricted to private Acts, and does not apply against the Crown (*n*). Even against the Crown, however, the uninterrupted user of a road by the public for forty or fifty years raises a presumption of dedication as a highway (*o*). The enrolment of a tithe award has been presumed where the usage of paying tithes has been shown (*p*).

Where there is evidence of a long exclusive enjoyment of property, and of an exercise of a distinct right referable to a legal origin, the Court will presume such an origin, and also (in the absence of proof to the contrary) that it commenced before legal memory (*q*). Even where long and undisputed enjoyment is shown to have had *de facto* an invalid or illegal or insufficient origin, still the Court will presume, if it can, that the illegality has been

(*h*) See *Haig* v. *West*, [1893] 2 Q. B. 19; *Foley's Charity* v. *Dudley Corporation*, [1910] 1 K. B. 317.

(*i*) *Philipps* v. *Halliday*, [1891] A. C. 228.

(*k*) See *Neill* v. *Duke of Devonshire*, 8 App. Cas. 158.

(*l*) *England* v. *Slade*, 4 T. R. 682; *Cooke* v. *Soltau*, 2 S. & S. 154; *Northam Bridge Co.* v. *S. Stoneham Rural Council*, 71 J. P. 345.

(*m*) *Goodtitle* v. *Baldwin*, 11 East, 488; see *University College, Oxford* v. *Oxford Corporation*, 68 J. P. 470.

(*n*) *Attorney-General* v. *Ewelme Hospital*, 17 Beav. 366. See *dicta* of Lord ABINGER in *Jewison* v. *Dyson*, 9 M. & W. 555; and of Lord WYNFORD in *Macdougall* v. *Purrier*, 2 Dow & Cl. 170.

(*o*) *R.* v. *East Mark*, 11 Q. B. 877; see *Van Diemen's Land Co.* v. *Marine Board of Table Cape*, [1906] A. C. 92.

(*p*) *Macdougall* v. *Purrier*, 2 Dow & Cl. 135.

(*q*) *Johnson* v. *Barnes*, L. R. 8 C. P. 527.

altered by something which has occurred in the course of time, and so clothe the enjoyment with legal right (*r*), unless, of course, the subsequent enjoyment is shown to be consistent with the right invalidly acquired rather than consistent with its having been made a legal right (*s*). So, where a manor had existed in the hands of the Crown, and the Crown had granted some of the lands of the manor to a subject by a grant which did not pass the manor, but the successors in title of the grantee had held manorial courts and kept court rolls continuously, a grant of the manor itself from the Crown was presumed (*t*).

The presumption of a lost grant or of a dedication to the public in order to justify an open and long-continued user as of right, is a rebuttable presumption of law (*u*). "I decline," said COZENS-HARDY, M.R., in *Farquhar* v. *Newbury Rural District Council* (*x*), "to look into what was or was said to be actually in the mind of the person" who was alleged to have dedicated a public right of way. Where a case involving this presumption is tried by a judge without a jury, the judge ought to find the existence or non-existence of the lost grant as a fact; if it is tried with a jury, it is for the jury to find the fact; and evidence is admissible to prove that there has not been, since the user commenced, any person capable of granting it. A lost grant will not be presumed in contravention of an Act of Parliament (*y*).

This presumption was well known prior to the reign of James I., for in the case of *Bedle* v. *Beard* (*z*), which was decided in 1606, it is recorded that the judges considered precedents. BOWEN, J., said, in *Dalton* v. *Angus* (*a*), that

(*r*) *Per* FRY, L.J., in *Halliday* v. *Phillips*, 23 Q. B. D. 56.
(*s*) See judgment of Lord HERSCHELL in *Philipps* v. *Halliday*, [1891] A. C. 236.
(*t*) *Merttens* v. *Hill*, [1901] 1 Ch. 842.
(*u*) *Farquhar* v. *Newbury Rural District Council*, [1909] 1 Ch. 12.
(*x*) *Ibid.* at p. 16.
(*y*) *Neaverson* v. *Peterborough, etc., Council*, [1902] 1 Ch. 557.
(*z*) 12 Rep. 5.
(*a*) 6 App. Cas. at p. 782.

it was originally nothing more than a rebuttable inference of fact. But it was not so regarded in later times; it came to be a legal fiction. "Juries were encouraged, for the sake of quieting possession, to infer the existence of deeds in whose existence nobody did believe" (*b*). No case can be found in which this presumption has been rebutted at Nisi Prius by proof that no such grant was ever in fact made; although proof that no such deed could be efficacious at law was always regarded as putting an end to the presumption.

As MOULTON, L.J., said in a recent case (*c*) as to the dedication of a highway across land under a settlement:

> "The plaintiff must show that it was impossible that dedication could take place, not merely that it was possible that it did not take place."

But this presumption must not be pressed too far. As Lord MACNAGHTEN remarks in *Simpson* v. *Attorney-General* (*d*), it cannot in every case be said:—

> "This state of things has gone on so long that it must now go on for ever. . . . It is quite true that the Court will go almost any length to support a right openly asserted, long continued, and never before contested if it can find any legal origin for such a right. But the converse does not hold good in the case of a burthen, however long it may have been borne. I took the liberty of asking the learned counsel for the respondents if he had any authority for making a presumption in favour of the legal obligation of an immemorial burthen, and he admitted that no such authority was to be found. There is authority the other way. In the great case of gleaning, *Steel* v. *Houghton* (*e*), HEATH, J., says: 'If A. and his ancestors have from time immemorial repaired a bridge or a highway, there is no obligation on him to continue the repair unless he is so bound by the tenure of lands or the like'" (*f*).

So a prescription in a *que* estate for a *profit à prendre in alieno solo* without stint and for commercial purposes is unknown to the law. Therefore, where by way of defence to an action of trespass by riparian proprietors,

(*b*) *Eldridge* v. *Knott*, 1 Cowp. 215.
(*c*) *Farquhar* v. *Newbury Rural District Council*, [1909] 1 Ch. at p. 18.
(*d*) [1904] A. C. at pp. 490, 491.
(*e*) 1 H. Bl. at p. 60.
(*f*) [1904] A. C. at p. 491.

the alleged trespass consisting in fishing in a non-tidal reach of a river of which the plaintiffs claimed to be the owners, the defendants set up a prescriptive right to a free fishery or common of fishery vested in the freehold tenants of a certain manor or hundred whose freeholds were situate in any of the parishes adjoining the river, and proved that they and their predecessors in title as such freeholders in exercise of such alleged right for three centuries past had openly and notoriously fished from boats with nets for salmon and other fish in the portion of the river in question and sold the fish so caught in the market, it was held, that the Court could not presume a legal origin for the alleged right (*g*).

The Court will not presume an incorporating charter from the Crown for the mere purpose of supporting a right otherwise incapable of having a legal origin, where the presumption is inconsistent with the past and existing state of things and there is no trace of such a corporation ever having existed (*h*).

The position has however to some extent been altered by the recognition in courts of law of equitable rights (*i*). As BOWEN, J., said in *Dalton* v. *Angus* (*k*) :—

"It would not now be sufficient to disprove a legal origin unless the possibility of an equitable origin were negatived as well."

Presumption of Innocence.

Whenever any one is accused of having done any act which amounts to a violation of the criminal law, or which would subject him to any species of punishment, or would involve any penalty or forfeiture, he will be presumed to be innocent until the contrary is proved. This is so whether the guilt

(*g*) *Lord Chesterfield* v. *Harris*, [1908] 2 Ch. 397.
(*h*) *Rivers* v. *Adams*, 3 Ex. D. 361.
(*i*) Under the Judicature Act, 1873.
(*k*) 6 App. Cas. at p. 783.

of the accused comes in question directly or collaterally. Where the omission to do a prescribed act will in certain circumstances amount to a criminal neglect, it is for the prosecution to prove affirmatively that the omission took place and that it took place under those circumstances, even though they may be thus driven to prove a negative.

Thus, where in a civil action it was alleged that the defendant, who had chartered the plaintiff's ship, put on board, without due notice to the captain, a combustible article by which loss was occasioned, it was held that the plaintiff must prove not only that the defendant did so, but that he did so without that notice, because such conduct would then amount to a misdemeanour (*l*).

In bigamy cases the prosecution must prove that the first husband or wife was alive at the date of the second marriage. Where, however, the prisoner and his or her spouse have been living apart for seven years, the prosecution must go further and prove that during that period the prisoner knew that the spouse was still alive (*m*); whether such husband or wife was alive at any time during the seven years is a question for the jury (*n*).

Whenever fraud is alleged, it must be distinctly pleaded and clearly proved at the trial; it will not be presumed (*o*). And this doctrine holds good even in the case of third parties, whose conduct comes in question collaterally (*p*). So the Courts will never presume a fraud upon a power of appointment (*q*). There are, it is true, many cases in

(*l*) *Per* Lord ELLENBOROUGH in *Williams* v. *East India Co.*, 3 East, at p. 199; Cockle, 26.

(*m*) *R.* v. *Curgerwen*, L. R. 1 C. C. R. 1.

(*n*) *R.* v. *Lumley*, L. R. 1 C. C. R. 196; and see *R.* v. *Tolson*, 23 Q. B. D. 168.

(*o*) *Mather* v. *Lord Maidstone*, 1 C. B. (N.S.) 273.

(*p*) *Ross* v. *Hunter*, 4 T. R. 38.

(*q*) *Hamilton* v. *Kerwan*, 2 Jo. & Lat. 393; *Pares* v. *Pares*, 33 L. J. Ch. 215.

which Courts of Equity have said that fraud will be presumed, *e.g.*, where a trustee purchases a portion of the trust fund (*r*), but this phrase merely means that the transaction is one of which the Court disapproves and which it will therefore set aside; it does not imply that the Court finds as a fact that the trustee acted fraudulently. Lord BROUGHAM, in *Hunter* v. *Atkyns* (*s*), put the matter on its true ground:—

"There are certain relations known to the law as attorney, guardian, trustee; if a person standing in these relations to client, ward, or *cestui que trust*, takes a gift or makes a bargain, the proof lies upon him that he has dealt with the other party, the client, ward, etc., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing everything to his knowledge which he himself knew. In short, the rule rightly considered is that the person standing in such relation must, before he can take a gift or even enter into a transaction, place himself in exactly the same position as a stranger would have been in, so that he may gain no advantage whatever from his relation to the other party, beyond what may be the natural and unavoidable consequence of kindness arising out of that relation."

The rule extends to cases of parent, solicitor, spiritual adviser and medical attendant, and to other cases in which two persons are so situated that one may naturally obtain considerable influence over the other (*t*).

There are, however, certain cases in which it has been expressly declared by statute that, on proof of certain acts done by A., the burden shall be thrown upon him to show that he had no fraudulent intention in doing them. Thus, as we have seen (*u*), on proof that a bankrupt has not handed over to his trustee all his property available for distribution among his creditors, he will be held guilty of a misdemeanour unless he can satisfy the jury that he had no intent to defraud.

(*r*) *Per* Lord ROMILLY in *Denton* v. *Donner*, 23 Beav. 290; and see *Foster* v. *Roberts*, 29 Beav. 470; *Tate* v. *Williamson*, L. R. 1 Eq. 528; and 31 Vict. c. 4, s. 1.

(*s*) 3 Myl. & K. at p. 135; cf. *Gibson* v. *Jeyes*, 6 Ves. 277.

(*t*) *Cooke* v. *Lamotte*, 15 Beav. 234; cf. *Allcard* v. *Skinner*, 36 Ch. D. 145, and particularly the judgment of LINDLEY, L.J.; and *Wright* v. *Carter*, [1903] 1 Ch. 27.

(*u*) See *ante*, p. 139.

Similarly the Bankruptcy Act, 1914 (*x*), s. 42, enacts that:—

"Any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof."

Presumption of Intention.

Every man is presumed to be sane until the contrary is shown. Every sane man is presumed to have known and to have intended the natural and necessary consequences of his act. This presumption is no doubt rebuttable in certain cases. But if a man is aware that certain consequences will probably follow the act which he contemplates doing and yet deliberately proceeds to do that act, he must be taken to have intended those consequences to follow, even though he may have hoped that they would not.

Thus, if any person who is sane and of full age deliberately does an act which was calculated to cause the death of another, he will be presumed to have intended the death of that other, and will be liable to be convicted of murder, unless he proves extenuating circumstances which may reduce the act from murder to manslaughter, or to justifiable or excusable homicide (*y*).

(*x*) 4 & 5 Geo. V. c. 59.
(*y*) *Per* Lord ELLENBOROUGH in *R.* v. *Dixon*, 3 M. & S. 15.

Again, a man is guilty of murder when he causes the death of another by doing a wanton act, such as driving a carriage furiously amongst a number of people, or discharging a loaded gun in the middle of a crowd (*z*).

A person who carried a child suffering from an infectious disease along a public highway, thus endangering the health of passengers, was held to be guilty of a misdemeanour, although she had no intention that any person should catch the disease (*a*); and, again, where a person had published a pamphlet with an indecent tendency, it was held to be no defence that he had done so with the *bonâ fide* purpose of exposing the alleged errors of the Church of Rome (*b*). Where a debtor knew that his departure from England would have the natural and necessary effect of defeating and delaying his creditors, he was held to have departed with that intent, and to have committed an act of bankruptcy (*c*).

In an action for libel, it was held that a judge was wrong in leaving it to a jury to say whether the defendant intended to injure the plaintiff, inasmuch as if the tendency of the libel was injurious to the plaintiff, the defendant must be taken to have intended the consequence of his own act (*d*). If a man intends to do one thing and does another, he will be judged by what he does and not by what he intends to do.

If A. presents a loaded revolver at B.'s head and pulls the trigger, it is an almost irresistible inference that A. intended to kill B. Nor will the mere fact that he did not know that the revolver was loaded in any way excuse the act.

But though it is easy thus to illustrate the operation of the presumption as to the intention of consequences, it is not easy to define the precise scope and effect of

(*z*) 1 Hale, P. C. 475.

(*a*) *R.* v. *Vantandillo*, 4 M. & S. 73.

(*b*) *R.* v. *Hicklin*, L. R. 3 Q. B. 360; *Steele* v. *Brannan*, L. R. 7 C. P. 261.

(*c*) *Ex parte Goater*, 22 W. R. 935.

(*d*) *Haire* v. *Wilson*, 9 B. & C. 643. See also *Fisher* v. *Clement*, 10 B. & C. 472; and cf. *E. Hulton & Co.* v. *Jones*, [1910] A. C. 20.

this presumption, or to state definitely how it may be rebutted. It will not be rebutted, however, merely by proof that the defendant never in fact intended that result to happen. But if he can show that the consequence, although physically inevitable, was not an obvious result of his act, or that it was only probable when certain circumstances co-existed, and he had no reason to know that some of them did exist, the presumption will be rebutted. Again, it is submitted that if he shows that the possibility of such a result never occurred to his mind, he cannot be held to have intended the result; although, indeed, he may be liable for other reasons. So, too, if he proves that at the time of the act he was incapable of forming any intention at all, that is, that he was insane, dead drunk, or acting under a *bonâ fide* mistake of fact or under coercion, the presumption will be rebutted (*e*).

The burden of proving all such facts as lunacy, somnambulism, mistake or duress, lies, of course, upon the person who seeks to rebut the presumption.

Presumption against a Wrongdoer.

There is a well-known maxim: *Omnia præsumuntur contra spoliatorem*—all things are presumed against a wrongdoer.

If a man, by his own wrongful act, withhold evidence by which the facts of the case would be manifested, every presumption to his disadvantage consistent with the facts admitted or proved will be adopted (*f*). Where a wrong has been committed, the wrongdoer must suffer from the impossibility of accurately ascertaining the amount of the damage (*g*).

(*e*) See *R.* v. *Beard*, [1920] A. C. 479.
(*f*) *Williamson* v. *Rover Cycle Co.*, [1901] 2 Ir. R. 619.
(*g*) *Leeds* v. *Amherst*, 20 Beav. 239.

In *Armory* v. *Delamirie* (*h*), the plaintiff, a boy, had found a jewel, which he handed for inspection to the defendant, a jeweller; and in trover for it, it was held, that unless the defendant produced it, the jury should presume it to be of the first water, and make the value of the best jewel that would fit the socket the measure of their damages. Where the deficiency of evidence arises from negligence, the party who is accountable for it cannot be benefited by it. Thus, where a liquor merchant sued for goods sold and delivered, and the only evidence was that some hampers of full bottles had been delivered to the defendant, but there was no evidence of the contents of the bottles, Lord ELLENBOROUGH told the jury to presume that the bottles were filled with the cheapest liquor in which the plaintiff dealt (*i*). Again, if an accounting party parts with or destroys his books, the strongest presumptions consistent with the rest of the case will be made against him (*k*).

But the facts of the case must be sufficient to raise the presumption: it will not arise unless there be either *mala fides* or negligence in the party against whom it is urged.

Thus, where the plaintiff, who had purchased a particular make of bicycle from the defendants, was injured by the top of the steering-post breaking, and claimed damages for breach of warranty of fitness, and had the broken parts of the bicycle examined by experts before sending them to the defendants for inspection, and the defendants after replacing the broken parts threw the broken pieces away, so that they were not produced at the trial, it was held that, in spite of this rule, the loss and non-production of the broken pieces

(*h*) 1 Sm. L. C. 396.
(*i*) *Clunnes* v. *Pezzey*, 1 Camp. 8.
(*k*) *Gray* v. *Haig*, 20 Beav. at pp. 230, 231; cf. *Harwood* v. *Goodright*, 1 Cowp. 87; *Mahood* v. *Mahood*, Ir. R. 8 Eq. 359.

by the defendants did not under the circumstances (the plaintiff's experts having seen the pieces) make the defendants *spoliatores* against whom the presumption applied, so as to shift on to them the burden of proof (*l*). And where a person refused to allow his former solicitor to give evidence of matters connected with the professional relation, it was held that there was no adverse presumption against him, Lord ST. LEONARDS saying that there was no analogy to the case of *Armory* v. *Delamirie* (*m*). The refusal to produce documents on notice, is not ground for any inference as to their contents (*n*).

Presumption of Continuance.

Where there is proof of the existence of a state of things and no evidence of its cessation, the presumption is that such state of things continues for a reasonable length of time (*o*).

Hence, if the question is whether a person is still alive, the burden of proving him dead lies, at first, on the party who asserts that fact (*p*); if, however, there be a question as to the exact date at which a person died, this is for the jury (*q*), and proof that he was alive at an antecedent date may or may not afford a reasonable inference that he was living at the subsequent date (*r*). Where it is proved that a person has not been heard of for seven years, a presumption arises that he is dead (*s*). But this presumption will not arise if the person in question left his home under circumstances which rendered it improbable

(*l*) *Williamson* v. *Rover Cycle Co.*, [1901] 2 Ir. R. 615.
(*m*) *Wentworth* v. *Lloyd*, 10 H. L. Cas. 589.
(*n*) *Cooper* v. *Gibbons*, 3 Camp. 363.
(*o*) *Gyse* v. *Ellis*, 1 Stra. 228.
(*p*) *Wilson* v. *Hodges*, 2 East, 312; Cockle, 28; KEKEWICH, J., however denied this in *In re Aldersey*, [1905] 2 Ch. 186.
(*q*) See *R.* v. *Willshire*, 6 Q. B. D. 366.
(*r*) *Per* GIFFARD, L.J., in *In re Phené's Trusts*, L. R. 5 Ch. 139; cf. *R.* v. *Lumley*, L. R. 1 C. C. R. 196; and *In re Rhodes*, 36 Ch. D. 586; but see *In re Benjamin*, [1902] 1 Ch. 723.
(*s*) *Nepean* v. *Doe*, 2 M. & W. 894; Cockle, 29.

that he would communicate with his friends (*ss*). There is no presumption as to the exact time, during the seven years, at which the person in question died. Whenever that date is material, it must be a subject of distinct proof by the party interested in fixing the time (*t*). Nor is there any presumption that he lived to the end of the period of seven years.

The fact that letters of administration have been granted is not sufficient proof of death (*u*). In the Probate Division of the High Court death is not presumed in the case of disappearance, but the applicant for a grant has to obtain leave "to swear the death" (*x*); and leave will be given in a proper case. The applicant has to swear to his belief of the death, and to prove that he has made proper and ample inquiries (*y*); leave will then be granted to the applicant to swear that he died "on or after" a day named (*z*). Death has been allowed to be sworn after three years' disappearance (*a*).

Even where a presumption arises that a man who has not been heard of for seven years is now dead, there is no presumption that he died without issue; that is a matter which must be established by evidence. This was laid down by COCKBURN, C.J., in *Greaves* v. *Greenwood* (*b*); and his decision was followed by KEKEWICH, J., in *In re Jackson* (*c*).

There is no fixed time at which a woman will be presumed to be past child-bearing. It depends on the particular circumstances of each case whether she is or

(*ss*) *Bowden* v. *Henderson*, 2 Sm. & G. 360; *McMahon* v. *McElroy*, 5 Ir. R. Eq. 1.

(*t*) *In re Phené's Trusts*, *supra*; *In re Lewes' Trusts*, L. R. 6 Ch. 357. See also *In re Benjamin*, [1902] 1 Ch. 723.

(*u*) *In re Beamish*, 9 W. R. 475.

(*x*) *In the Goods of Jackson*, 87 L. T. 475.

(*y*) *In the Goods of Clarke*, [1896] P. 287; cf. *In re Walker*, [1909] P. 115.

(*z*) Tristram and Coote's "Probate Practice," 15th ed., 79, 310–312.

(*a*) *In the Goods of Matthews*, [1898] P. 17.

(*b*) 2 Ex. D. 289.

(*c*) [1907] 2 Ch. 354; and see *Re Hankey*, 25 W. R. 427; *Re Webb*, Ir. R. 5 Eq. 235; *Rawlinson* v. *Miller*, L. R. 1 Eq. 52.

not. As a general rule, in the absence of special circumstances (*d*), she is not considered to be past child-bearing until she is at least fifty-six years of age. But in *Re Sumner* (*e*), and also in *Re Millner* (*f*), a woman under fifty was, under the circumstances, found to be past child-bearing. In *Croxton* v. *May* (*g*), the inference was not drawn in the case of a woman just over fifty-four, but she had only been married three years. It was drawn in *Re White* (*h*), where a woman was just over fifty-six. No analogous inference of incapacity arises in the case of a man, whatever his age.

Where several persons have perished in the same calamity, the presumption was once said to be in favour of the survival of the stronger party (*i*); but in a case where it appeared that a husband, his wife, and their two children, were washed off from the deck of a ship by the same wave and drowned, the House of Lords held, that in the absence of further evidence it must be taken that all died at the same moment, as there was no presumption at all in such a case (*k*). This rule was applied by the Court of Probate when husband and wife were both killed in a railway accident, and the bodies were found two hours afterwards (*l*), and administration was granted to the next of kin of each; so also where husband and wife were proved to have been on board a vessel which was totally lost at sea (*m*).

Again, every person acquires a domicil of origin at birth, which is that of the father at that date in the case of a legitimate child, and that of the mother in the case of an illegitimate child; this domicil continues until it is

(*d*) The circumstances to be considered are—whether a spinster or married: if married, how long, whether husband alive or dead, whether children or not, and when last child was born. See *In re Thornhill*, [1904] W. N. 112, and the next four cases in the text.
(*e*) 22 W. R. 639.
(*f*) L. R. 14 Eq. 245.
(*g*) 9 Ch. D. 388.
(*h*) [1901] 1 Ch. 570.
(*i*) *Sillick* v. *Booth*, 1 Y. & C. 117.
(*k*) *Wing* v. *Angrave*, 8 H. L. Cas. 183; Cockle, 34.
(*l*) *In the Goods of Wheeler*, 31 L. J. P. M. & A. 40.
(*m*) *In the Goods of Alston*, [1892] P. 142.

abandoned and a new one acquired. The presumption is in favour of the continuance of the domicil of origin, and the burden of proof is on those who allege the acquisition of a new one. Mere residence, however long, in a country which is not that of the domicil of origin does not prove the abandonment of the old domicil and the acquisition of a new one, but it is an element to be taken into consideration (*n*). But long and continuous residence, coupled with other circumstances, may raise a strong presumption of an intention to renounce the domicil of origin and acquire a new one in a particular country (*o*). The question in all these cases is, had the person whose domicil at the time of his death is in dispute settled in another country with the fixed intention of establishing his domicil there, and abandoning his previous domicil? If not, his domicil of origin continues.

We can here allude only briefly to some other well-known presumptions of law. Take, for example, those relating to the Ownership of Land. When two parishes or properties are separated by a highway, the presumption is that the *medium filum viæ* is the actual boundary (*p*); when they are separated by a river the *medium filum aquæ* is presumed to be the actual boundary. This rule has been also applied to an artificial watercourse (*q*). But by International Law, where two States are bounded by a river, the middle of the navigable channel or *Thalweg* is presumed to be the boundary, with a common right of navigation to both. When there is an island in a river, so that the river is divided thereby into two streams, there is no presumption that the *medium filum* runs through the island (*r*).

(*n*) *Per* COLLINS, M.R., in *Sourdis* v. *Keyser*, 18 T. L. R. 416.
(*o*) See *Attorney-General* v. *Winans*, 85 L. T. 508; reversed by the House of Lords on the facts (*Winans* v. *Attorney-General*, [1904] A. C. 287).
(*p*) *R.* v. *Strand Board of Works*, 4 B. & S. 526.
(*q*) *Whitmores* v. *Stanford*, [1909] 1 Ch. 427.
(*r*) *Great Torrington Commons Conservators* v. *Moore Stevens*, [1904] 1 Ch. 347.

The soil of a public highway is presumed to belong to the owners of the adjacent lands *usque ad medium filum viæ* (*s*), and this applies to the case of a street in a town (*t*). It does not, however, apply in the case of ground which is intended to be used as a highway, but has not been dedicated to the public (*u*). The rule is thus stated by COTTON, L.J. (*x*):—

"The rule of construction is now well settled, that where there is a conveyance of land, even although it is described by reference to a plan, and by colour, and by quantity, if it is said to be bounded on one side either by a river or by a public thoroughfare, then on the true construction of the instrument, half the bed of the river or half of the road passes, unless there is enough in the circumstances, or enough in the expressions of the instrument, to show that it is not the intention of the parties."

The presumption that the bed and soil of a stream belong to the riparian owners does not apply to a large non-tidal and navigable lake (*y*). In the case of an ordinary highway running between fences, although the space between them may be of varying and unequal width, the right of passage or way *primâ facie*, and unless there be evidence to the contrary, extends to the whole of the ground between the fences, and the public are not confined to the metalled portion (*z*).

There are also a number of presumptions which arise in connection with Bills of Exchange. Thus, every person whose signature appears on a bill is *primâ facie* deemed to have become a party to it for value. Again, every holder of a bill is *primâ facie* deemed to have become the holder of it before it was overdue, in good

(*s*) For cases in which the presumption was rebutted, see *Pryor* v. *Petre*, [1894] 2 Ch. 11; *Plumbley* v. *Lock*, 67 J. P. 237; *Mappin* v. *Liberty*, [1903] 1 Ch. 118.

(*t*) *In re White's Charities*, [1898] 1 Ch. 659.

(*u*) *Leigh* v. *Jack*, 5 Ex. D. 264.

(*x*) *Micklethwait* v. *Newlay Bridge Co.*, 33 Ch. D. at p. 145.

(*y*) *Johnston* v. *Bloomfield*, Ir. R. 8 C. L. 68.

(*z*) *Harvey* v. *Truro Rural District Council*, [1903] 2 Ch. 638; *Offin* v. *Rochford Rural Council*, [1906] 1 Ch. 342. In *Belmore* v. *Kent County Council*, [1901] 1 Ch. 873, this presumption was rebutted.

faith, for value, and without notice of any defect in the title of the person from whom he took it. But if in an action on a bill it is admitted or proved that there was any fraud or illegality in the acceptance, issue, or subsequent negotiation of the bill, the burden of proof is shifted, and the holder must prove that after such fraud or illegality value was in good faith given for the bill (*a*).

Similarly, by the Bills of Lading Act, 1855 (*b*), section 3—

"Every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board; provided, that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims."

It has been held that this section does not estop the owners of a ship from showing the incorrectness of the bill of lading signed by the ship's agent as to the weight of goods actually shipped (*c*); and in an action for freight the master is not estopped from denying the amount of goods actually received, though he would be estopped in an action against the owners for non-delivery (*d*).

In many cases it has been held that no presumption of law arises, although facts have been proved which point to a certain conclusion. Thus, if a man engaged on board ship falls overboard and is drowned, but there is nothing to show what were the circumstances, no presumption arises that he was drowned by an accident which arose

(*a*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 30; *Tatam* v. *Haslar*, 23 Q. B. D. 345.

(*b*) 18 & 19 Vict. c. 111.

(*c*) *Jessel* v. *Bath*, L. R. 2 Ex. 267; *Grant* v. *Norway*, 10 C. B. 665.

(*d*) *Blanchet* v. *Llantivit Colliery Co.*, L. R. 9 Ex. 77.

"out of his employment" (*e*). Again, if the lessor be proved to be in possession of an indenture of lease with the seals cut off, the Court will not presume that the lessee surrendered the term in the manner required by law (*f*). Nor, if a man give a bond to a woman with whom he is then cohabiting, will the presumption arise that it was in consideration of her consenting to continue the cohabitation in the future (*g*).

Again, the so-called presumptions of Satisfaction, Ademption, and Advancement, which are so often met with in Courts of Equity, are not presumptions of law at all. They are rules which have been laid down to enable judges to decide issues of fact according to fixed principles—such issue of fact generally being, What was the intention of the party ?

If the word "presumption" is used in the narrower sense indicated at the commencement of this chapter, it is seldom, if ever, possible that presumptions should conflict; and it is not clear what the law is should such a conflict arise. It has been said that in such a case, the stronger prevails, but where there are two presumptions both of which must be drawn as a matter of law there is nothing to show which is the stronger. Both, surely, must be equally strong. The true position appears to be that where so-called presumptions conflict, the whole of the facts must be left to the jury as evidence upon which they are to decide (*h*).

(*e*) *Marshall* v. *Wild Rose*, [1909] 2 K. B. 46; *Bender* v. *Zent*, *ibid.*, p. 41; but see *Low* v. *General Steam Fishing Co.*, [1909] A. C. 523.
(*f*) *Doe* v. *Thomas*, 9 B. & C. 288.
(*g*) *Vallance* v. *Blagden*, 26 Ch. D. 353.
(*h*) See *R.* v. *Willshire*, 6 Q. B. D. 366.

CHAPTER XII.

ADMISSIONS.

The burden of proof is also lightened when the opposite party has admitted all or some of the facts upon which his opponent relies. An admitted fact need not be proved.

There are two kinds of admissions :—

I. Formal, made intentionally with a view to the proceedings.

II. Informal, made without any reference to proceedings.

Formal admissions may be made in six ways : (i.) on the pleadings ; (ii.) in answer to interrogatories ; (iii.) in answer to a notice to admit specified facts ; (iv.) in answer to a notice to produce and admit documents ; (v.) by the solicitor of a party during the litigation ; and (vi.) in open Court by the litigant himself, or by his advocate. A person charged with a criminal offence can admit the truth of the charge, but it seems still to be the law that if he pleads "Not guilty" he cannot lighten the task of the prosecution by admitting any incidental fact which is a stage in the proof of his guilt.

An informal admission may be made in any way. It has therefore much less weight than a formal admission, and may be much more easily explained away. But, if clearly proved and sufficiently explicit in its terms, it shifts the burden of proof.

The only exceptions to the admissibility of informal admissions are, that in criminal cases a "confession" cannot be put in evidence if it has been obtained by improper inducements (*a*), and in civil cases admissions made in communications made "without prejudice" are excluded (*b*).

A person who is of full age and sound mind is bound by admissions made by himself or his agent, but the admissions of agents only bind the principal when the agent has authority to make them on his behalf. Thus, a general agent may bind his principal by admissions in the usual course of business; but a particular agent's authority is strictly limited to the actual business which he is employed to do, and his admissions will only bind his principal if made during his employment and within the scope of his duty. A person is also bound by admissions made by anyone through whom his title or claim is derived, when such person had the same interest or estate as the present party now has. A person who has a representative capacity can make admissions, which are evidence against those whom he represents, provided he has made them while acting in that capacity; and then such admissions are not evidence in actions against him personally. But the committee of a lunatic has no authority to bind the lunatic.

The proof of an admission is not open to the objection that it is hearsay. The precise words of the admission are material, and must be proved by primary evidence.

(*a*) See *ante*, pp. 95 *et seq.*
(*b*) See *ante*, p. 252.

Admissions resemble presumptions in that they are conclusive as to the facts to which they relate, unless the party against whom they are tendered brings forward evidence to destroy them or explain them away; they differ from estoppels, however, for it is of the essence of an estoppel that the party who is estopped cannot bring forward any evidence to contradict his former conduct—in other words, an estoppel is a conclusive admission (*c*).

As BAYLEY, J., said, in *Heane* v. *Rogers* (*d*):—

"There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence—and strong evidence—against him; but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and that he is not estopped or concluded by them, unless another person has been induced by them to alter his condition: in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him) and that transaction; but as to third persons he is not bound."

I. FORMAL ADMISSIONS.

(1) *On the Pleadings.*

Any party to a civil action may expressly admit facts on his pleadings, etc. Thus, by R. S. C., Order XXXII., r. 1:—

"Any party to a cause or matter may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party."

And by r. 6 of the same Order:—

"Any party may at any stage of a cause or matter, where admissions of fact have been made, either on the pleadings or otherwise, apply to the Court or a judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court or a judge may upon such application make such order, or give such judgment, as the Court or judge may think just."

(*c*) Cf. *R.* v. *Erdheim*, [1896] 2 Q. B. p. 270.
(*d*) 9 B. & C. at p. 586.

In addition to such express admissions, a party may by not pleading, or insufficiently pleading, to an allegation of fact, impliedly admit it, Order XIX., r. 13, providing that—

"Every allegation of fact in any pleading, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not so found by inquisition."

There are three exceptions to this rule:—

(i.) By Order XXI., r. 4:—

"No denial or defence shall be necessary as to damages claimed or their amount; but they shall be deemed to be put in issue in all cases, unless expressly admitted."

(ii.) A defendant in possession, in an action to recover land, need not plead his title unless his defence rests upon an equitable estate or right, or he claims relief upon any equitable ground, it being provided by Order XXI., r. 21, that, except in such cases, a plea that he is in possession shall be a sufficient denial of the plaintiff's allegations.

(iii.) The plea of "Not Guilty by Statute" (which now, however, is very seldom pleaded) (*e*) also impliedly traverses all material allegations of fact in a statement of claim.

The effect of payment into court as an admission of liability is now governed by Order XXII. of the R. S. C., 1883. Under Rule 1 of this Order (which is confined to actions to recover a debt or damages and Admiralty actions) a defendant may pay money into court by way of satisfaction, which admits the claim or cause of action in respect of which the payment is made, or he may, with a defence denying liability (except in actions or counterclaims for libel or slander), pay money into court, which will be subject to the provisions of Rule 6. Payment into court without a denial of liability is only

(*e*) Its use is expressly forbidden in a large number of cases by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 2.

an admission of liability up to the amount paid in. Therefore, where, in an action on a bill for work done, the defendants paid in £10 without any denial of liability, the defendants were held not precluded from showing that the work was not done at their request except as to that amount (*f*). Payment into court with a denial of liability is not an admission of the cause of action (*g*), although, under Rule 6, the plaintiff may accept it in satisfaction of the claim or cause of action in respect of which the payment into court has been made, in which case he is entitled to have the money paid out to him, and to sign judgment for his costs to date. If payment is made with denial of liability, but at the same time a formal admission is made that liability is not disputed, the defence will be struck out (*h*).

(2) *In Answer to Interrogatories* (*i*).

Either party may in a proper case obtain an order that his opponent shall answer certain written questions before the trial. The chief object of these questions is to obtain admissions that will save trouble and expense at the trial. Answering interrogatories differs from pleading to the allegations in a statement of claim or defence in these respects:—

(a) The party interrogated must answer them;

(b) He must answer them fully and fairly;

(c) He must answer the substance and not the letter of the question;

(d) He must answer them on oath.

In this case, therefore, he is compelled to make admissions, but he cannot be compelled to answer anything which is not within his own knowledge, unless he can obtain it

(*f*) *Hennell* v. *Davies*, [1893] 1 Q. B. 367.

(*g*) *Coote* v. *Ford*, [1899] 2 Ch. 93; and see *J. R. Munday, Ltd.* v. *L.C.C.*, [1916] 2 K. B. 331.

(*h*) *Critchell* v. *London and South Western Rail. Co.*, [1907] 1 K. B. 860.

(*i*) This subject is more fully dealt with in Book IV., Chap. II., *post*, p. 536.

from persons in his employment, who must have acquired their knowledge in the course of their employment (*j*).

(3) *On Notice to Admit Facts.*

In order to save expense and facilitate proceedings, it is usual and right for each party, previous to trial, to call on the opposite party to make various admissions. These admissions are now regulated, in the High Court, by Order XXXII., r. 4, which provides:—

"Any party may, by notice in writing, at any time not later than nine days before the day for which notice of trial has been given, call on any other party to admit, for the purposes of the cause, matter, or issue only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court or a judge, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the cause, matter, or issue may be, unless at the trial or hearing the Court or a judge certify that the refusal to admit was reasonable, or unless the Court or a judge shall at any time otherwise order or direct. Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular cause, matter, or issue, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice: provided also, that the Court or a judge may at any time allow any party to amend or withdraw any admission so made on such terms as may be just."

The party served with such a notice is not bound to admit anything; hence the power to serve a notice to admit facts is not used as freely as it ought to be. But a refusal to make proper admissions may affect costs. And it should be noted that, unlike interrogatories, a notice to admit facts may be served in respect of things ancient (such as the death of an ancestor), or things only known to the other side or to a third person.

(*j*) *Bolckow, Vaughan & Co.* v. *Fisher*, 10 Q. B. D. 161; *Rasbotham* v. *Shropshire Union, etc. Co.*, 24 Ch. D. 110; *Hall* v. *London and North Western Rail. Co.*, 35 L. T. 848; *Ehrmann* v. *Ehrmann*, [1896] 2 Ch. 611; *Welsbach, etc., Co.* v. *New Sunlight Co.*, [1900] 2 Ch. 1.

(4) *On Notice to Admit Documents.*

A notice to admit may be served, not only as to facts, but also as to documents. It is provided, by Order XXXII., r. 2, that—

"Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the cause or matter may be, unless at the trial or hearing the Court or a judge shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense" (*k*).

This rule is substantially the same as Order XXXII., r. 2, of the R. S. C., 1875, and is also similar to the practice existing prior to 1875 under the Common Law Procedure Act, 1852 (*l*), and the Chancery Amendment Act, 1858 (*m*). Under those Acts it was held that a party, by admitting a document, does not thereby in any way recognise its legal validity, but merely enables the opposite party to dispense with the usual evidence which would otherwise be necessary to bring it before the Court. Thus, when a party admitted his signature to a bill of exchange, he was still allowed to object to the insufficiency of the stamp (*n*); and an admission on notice of certain documents which were described as copies of, or extracts from, certain original documents, was held not to make such copies evidence, in the absence of sufficient reason for the non-production of the originals (*o*). An admission of a bill of exchange drawn by the plaintiff, directed to the defendants, "and accepted by one H. B. for the defendants," was held to estop the defendants from disputing H. B.'s authority to accept (*p*); so it has been held that,

(*k*) A similar provision is contained in the County Court Rules 1903–1920, Order XVIII., r. 6.
(*l*) 15 & 16 Vict. c. 76.
(*m*) 21 & 22 Vict. c. 27.
(*n*) *Vane* v. *Whittington*, 2 Dowl. (N.S.) 757.
(*o*) *Sharpe* v. *Lamb*, 11 A. & E. 805.
(*p*) *Wilkes* v. *Hopkins*, 1 C. B. 737.

after admission of a deed, no objection can be taken to an erasure or interlineation which may appear (*q*).

The Courts will not sanction any agreement for an admission by which any of the known principles of law are evaded. No effect, therefore, will be given to an agreement to waive an objection arising from a deed not having been stamped (*r*).

(5) *Admissions by Solicitors.*

A solicitor is presumed to have a general authority for whatever he may say or do on behalf of his client in the conduct of a case; and his authority to make admissions will be implied when he has been proved to be the solicitor on the record (*s*). A solicitor can always make a formal admission in the course of the litigation which will bind his client. Such an admission may afford ground for an application for judgment under Order XXXII., r. 6; for this purpose it need not be an admission made under r. 1 or r. 4 of the same Order; it may be contained in a letter written by the solicitor which states facts showing that his client has no case (*t*). But it is clear that whatever a solicitor says in the course of casual conversation is not evidence in the cause (*u*).

The solicitor on the record is bound by the acts of his London agent, and so is the client if it is not in defiance of his direct and positive instructions (*x*); the same rule applies when a London solicitor employs a country solicitor as his agent in a district registry.

Where an attorney on the record gave the following undertaking: "I hereby undertake to appear for A. and B., joint owners of the sloop *Arundel*," this was held sufficient *primâ facie* evidence that A. and B. were

(*q*) *Freeman* v. *Steggal*, 14 Q. B. 202.
(*r*) *Owen* v. *Thomas*, 3 Myl. & K. 357.
(*s*) *Gainsford* v. *Grammar*, 2 Camp. 9.
(*t*) *Ellis* v. *Allen*, [1914] 1 Ch. 904.
(*u*) *Per* Lord ELLENBOROUGH, C.J., in *Young* v. *Wright*, 1 Camp. 159; and see *Petch* v. *Lyon*, 9 Q. B. 147.
(*x*) *Carruthers* v. *Newen*, [1903] 1 Ch. 812.

such joint owners (*y*); but an admission before action by an attorney, who afterwards appeared on the record, has been held insufficient without proof that he was authorised at the time to make the admission (*z*). An admission by a solicitor's clerk or agent is as valid as an admission by the solicitor himself (*a*). So, in an action on a bill, an admission by the defendant's attorney that the acceptance was in his client's handwriting is evidence of acceptance without production of the bill (*b*). Of course, the client is not bound by admissions made by his solicitor fraudulently (*c*).

If in delivering a defence the solicitor for the defendant makes a formal admission that the defendant will not set up one of the defences pleaded, the whole defence will be struck out as an abuse of the process of the Court (*d*).

(6) *Admissions by Counsel.*

Generally counsel have authority to make all admissions in civil cases, which they may think proper in the conduct of a case (*e*), unless they are expressly forbidden so to do (*f*). Accordingly a special case signed by counsel on each side, at a formal trial, has been held evidence of all the facts therein stated, at a subsequent trial (*g*); but ordinary and less formal admissions by counsel at a former trial are not evidence on a subsequent trial (*h*). When counsel with the authority of their clients consent

(*y*) *Marshall* v. *Cliff*, 4 Camp. 133.
(*z*) *Wagstaff* v. *Wilson*, 4 B. & Ad. 339.
(*a*) *Taylor* v. *Willans*, 2 B. & Ad. 845.
(*b*) *Chaplin* v. *Levy*, 9 Ex. 531; and see *Dorrett* v. *Meux*, 15 C. B. 142.
(*c*) *Williams* v. *Preston*, 20 Ch. D. 672.
(*d*) *Critchell* v. *London and South Western Rail. Co.*, [1907] 1 K. B. 860.
(*e*) *Swinfen* v. *Chelmsford*, 5 H. & N. 890.
(*f*) *Neale* v. *Gordon-Lennox*, [1902] A. C. 465; *Kempshall* v. *Holland*, 14 R. 336.
(*g*) *Van Wart* v. *Woolley*, Ry. & M. 4; *Swinfen* v. *Swinfen*, 18 C. B. 485.
(*h*) *Colledge* v. *Horn*, 3 Bing. 119.

to an order, the clients cannot arbitrarily withdraw such consent (*i*).

In criminal matters, the solicitor of the accused cannot make admissions nor, it seems, can his counsel at the trial (*k*). As to the accused himself, before the magistrates he is always asked whether he wishes to make a statement, and at the same time is cautioned that what he says will be taken down in writing and may be given in evidence against him at his trial (*l*). The statement made in response to this inquiry often contains damaging admissions. It is almost invariably put in by the counsel for the prosecution as part of his case, whether it tells in favour of the prisoner or against him. When the prisoner is arraigned, he frequently pleads "Guilty," and on this admission he is sentenced without any other evidence of his guilt being given. So, in criminal proceedings for libel, if the defendant does not plead a justification under Lord Campbell's Libel Act, in addition to a plea of "Not guilty," he will be deemed to have admitted that the words are false. Again, if a prisoner elects to go into the witness box and give evidence on oath, he will be cross-examined with the object of proving that he is guilty of the crime of which he then stands charged, and, under such cross-examination, he frequently makes admissions which will be pressed upon the jury against him. But it appears still to be the law that an accused person cannot in any other way make incidental admissions in the course of the trial to facilitate the proof of the case for the prosecution.

II. Informal Admissions.

Informal admissions may be made orally or in writing, or even by conduct (*m*). They may have

(*i*) *Harvey* v. *Croydon Union Rural Sanitary Authority*, 26 Ch. D. 249.
(*k*) *R.* v. *Thornhill*, 8 C. & P. 575.
(*l*) See *ante*, pp. 99, 100.
(*m*) *R.* v. *Norton*, [1910] 2 K. B. at p. 499; and see *R. Christie*, [1914] A. C. 545.

been made in business correspondence or in casual conversation long before any litigation began or was even contemplated, and with no intention of making a binding admission. They are therefore more easily explained away than formal admissions. But if sufficiently clear they shift the burden of proof.

Admissions need not be in express words. They may be gathered from a mere narrative or description. Thus, a catalogue of goods, described as belonging to A., "a bankrupt," was held to be an admission of the auctioneer issuing the catalogue that A. was bankrupt (*n*).

Admissions may also be made by conduct, and even sometimes by mere silence. Thus it has been said that a declaration in the presence of a party to a cause is evidence, as we have seen, because it is important to observe the conduct of the party upon hearing it. He may admit it or deny it, and even silence may be significant (*o*). Silence, indeed, is worth very little where the party hearing it has no means of knowing the truth or falsehood of the statement (*p*), or where the circumstances are such that he could not be expected to contradict the statement (*q*); *e.g.*, when he is in court during the examination of a witness. A mere conditional acknowledgment of liability, in the event of a party primarily liable not paying, will not dispense with the necessity of formal notice of dishonour of a bill (*r*). Where, however, the indorser of a bill, being told that the holders were about to take proceedings against him, said he would pay if time was given him, it was held that he had

(*n*) *Maltby* v. *Christie*, 1 Esp. 340; Cockle, 157.
(*o*) *Price* v. *Burva*, 6 W. R. 40.
(*p*) *Per* PARKE, B., in *Hayslep* v. *Gymer*, 1 A. & E. 163; cf. *Neile* v. *Jakle*, 2 Car. & K. 709.
(*q*) *Boyd* v. *Bolton*, Ir. R. 8 Eq. 113; *Bessela* v. *Stern*, 2 C. P. D. 265.
(*r*) *Hicks* v. *Duke of Beaufort*, 4 Bing. N. C. 229.

waived his right to notice of dishonour (*s*). In settlement cases, proof that a parish has given relief to a pauper for seven years has been held to be evidence that the pauper was settled in that parish (*t*). So, the fact that relief was given to a pauper residing out of the relieving parish admits a settlement (*u*); but mere relief of casual paupers is no evidence of a settlement (*x*), even where the relieving parish has enabled the pauper to remove to another parish (*y*). Proof that a party to an action (though not himself examined) has requested others to give false evidence, is evidence against him as an admission against his own case (*z*).

Acquiescence in an act is evidence of an admission; but, to make it so, it has been said that it must exhibit some act of the mind, and amount to voluntary demeanour or conduct of the party. In order that the non-repudiation by a principal of an unauthorised act of an agent should bind the principal, it must be shown that the latter had present to his mind proper materials on which to exercise his election (*a*).

"Acquiescence and ratification must be founded on a full knowledge of the facts; and further, it must be in relation to a transaction which may be valid in itself and not illegal, and to which effect may be given as against the party by his acquiescence in and adoption of the transaction" (*b*).

If an account be delivered and retained for a considerable time without objection, the recipient will be taken to admit that it is correct (*c*); and where an account has been stated, and a bill given for the amount, the debtor cannot, in an action on the bill, dispute the

(*s*) *Woods* v. *Dean*, 3 B. & S. 101.
(*t*) *R.* v. *Barnsley*, 1 M. & S. 377.
(*u*) *R.* v. *Edwinstowe*, 8 B. & C. 671.
(*x*) *R.* v. *Chatham*, 8 East, 498.
(*y*) *R.* v. *Trowbridge*, 7 B. & C. 252.
(*z*) *Moriarty* v. *London, Chatham and Dover Rail. Co.*, L. R. 5 Q. B. 314.
(*a*) See *De Bussche* v. *Alt*, 8 Ch. D. 286.
(*b*) *Per* Lord FITZGERALD in *La Banque Jacques Cartier* v. *La Banque d'Epargne, etc. de Montreal*, 13 App. Cas. 118.
(*c*) *Willis* v. *Jerneyan*, 2 Atk. 252.

figures in the account (*d*). An objection to one of several items in an account, without remark as to the others, is evidence of an admission that the others are correct (*e*). The fact that a course of dealing has taken place between the parties for a considerable time, and one of them never objected, is evidence against him that he acquiesced in that course as being a proper one (*f*). An account sent by a creditor to a debtor is an admission by the creditor of the terms of the contract so far as they are stated therein (*g*); and this will be so even if the account, although made out, was not sent in (*h*).

A notice to quit lands, which has been served and not objected to, is evidence against the tenant that the tenancy commenced at the season of the year when the notice to quit expires (*i*). So, in an action for use and occupation, payment of rent is evidence of a holding, and of its terms (*k*). The mere omission to take legal proceedings in respect of a wrongful act is not acquiescence in it (*l*).

A party's own statements as to any matter of fact are always evidence against himself, even where they relate to the contents of a deed, or other written instrument (*m*). Thus an abstract or affidavit used by a person on a reference before a master in order to prove title in himself may be received in evidence against him in subsequent litigation (*n*). It will be otherwise if the statement only amounts to an expression of opinion, *e.g.*, on a matter of law (*o*).

So it was held, that an examined copy of answers to

(*d*) *Knox* v. *Whalley*, 1 Esp. 159.
(*e*) *Chisman* v. *Count*, 2 Man. & G. 307.
(*f*) See *Williamson* v. *Williamson*, L. R. 7 Eq. 542.
(*g*) *Morland* v. *Isaac*, 20 Beav. 392.
(*h*) *Bruce* v. *Garden*, 17 W. R. 990.
(*i*) *Thomas* v. *Thomas*, 2 Camp. 647.
(*k*) *Harden* v. *Hesketh*, 4 H. & N. 175.
(*l*) *Fulwood* v. *Fulwood*, 9 Ch. D. 176; cf. *Rowland* v. *Mitchell*, 13 R. P. C. 457; *London, Chatham and Dover Rail. Co.* v. *Ball*, 47 L. T. 413.
(*m*) *Slatterie* v. *Pooley*, 6 M. & W. 664.
(*n*) *Pritchard* v. *Bagshawe*, 11 C. B. 459.
(*o*) *Morgan* v. *Couchman*, 14 C. B. 100.

interrogatories, filed in the usual way, may be read in evidence against the person making them in a subsequent action to which he is a party, without proof of his handwriting or production of the interrogatories themselves (*p*).

The fact that no reply has been sent to a letter received is, as a rule, not regarded as an admission that the statements in it are correct (*q*). To some letters the only possible reply is a dignified silence. But the circumstances or the relations between the parties may be such that a reply might properly be expected, and in such cases the failure to reply is some evidence that the statements in the letter are true (*r*). As soon as it is proved that a man has received a certain letter his subsequent words and conduct may amount to admissions (*s*).

A wife's confession of her adultery is evidence which is sufficient against her but not against the adulterer (*t*). But the Court is loath to act upon such an admission without corroboration (*u*). Where, however, the confession is clear, distinct, and unequivocal, the Court may act on it without any corroboration (*x*).

It should be remembered that admissions, whether written or oral, which do not create an estoppel, constitute only *primâ facie* and rebuttable evidence against their makers, and those claiming under them.

Thus, by s. 55 of the Conveyancing Act, 1881 (*y*)—

"A receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given

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(*p*) *Fleet* v. *Perrins*, L. R. 3 Q. B. 536; and see the remarks of CROMPTON, J., in *Richards* v. *Morgan*, 4 B. & S. 641.

(*q*) *Per* BOWEN, L.J., in *Wiedemann* v. *Walpole*, [1891] 2 Q. B. 539.

(*r*) *Per* WILLES, J., in *Richards* v. *Gellatly*, L. R. 7 C. P. 131; *Lucy* v. *Mouflet*, 5 H. & N. 229; but see the remarks of Lord HATHERLEY in *Challis's Case*, L. R. 6 Ch. 266.

(*s*) *Gaskill* v. *Skene*, 14 Q. B. 664.

(*t*) *Robinson* v. *Robinson*, 1 S. & T. at p. 393.

(*u*) *White* v. *White*, 62 L. T. 663.

(*x*) *Williams* v. *Williams*, L. R. 1 P. & D. 29; *Hartley* v. *Hartley and Fleming*, 35 T. L. R. 298.

(*y*) 44 & 45 Vict. c. 41.

wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof."

A receipt in writing or a parol acknowledgment of the receipt of money is only *primâ facie* evidence of payment. Thus a plaintiff, who had given the defendant a receipt for goods sold with a view to defraud his creditors, can show that no money had passed, and that no sale had ever taken place (*z*). So entries in the creditor's own books of moneys received are *primâ facie* evidence against the creditor. Entries of payments are not, as a general rule, evidence in his favour, but entries of payments may be so connected with entries of receipts, that if the latter are read against the maker, the former would be admissible in his favour (*a*). Under Order XXXIII., r. 3, of the R. S. C., 1883, the Court or a judge may direct that, in taking an account, the books of account in which the accounts in question have been kept shall be taken as *primâ facie* evidence of the truth of the matters therein contained.

The admission by a partner concerning the partnership affairs is evidence against his co-partners, if made in the ordinary course of business (*b*); that of an agent is evidence against his principal; that of one of several parties jointly interested is evidence against the others or other of them; and that of a predecessor in title or privy in estate is evidence against the successor in title or interest (*c*).

Thus, the admission by one of several plaintiffs, who are suing as partners, that the subject-matter of the action was his own personal contract, has been received as evidence to bar the action (*d*). And generally, in partnership transactions, the representations, although

(*z*) *Bowes* v. *Foster*, 2 H. & N. 779; *Alner* v. *George*, 1 Camp. 392, is no longer law.

(*a*) *Per* KINDERSLEY, V.-C., in *Reeve* v. *Whitmore*, 4 De G., J. & Sm. 1.

(*b*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 15.

(*c*) *Woolway* v. *Rowe*, 1 A. & E. 114; Cockle, 179.

(*d*) *Lucas* v. *De la Cour*, 1 M. & S. 249.

tortious or fraudulent, of a partner are binding on his co-partners (*e*). So, the admission of a retired partner as to a partnership transaction while he was in the firm, is evidence in an action against a continuing partner (*f*); and admissions made by one partner after dissolution are admissible to prove payment of a partnership debt before dissolution (*g*).

When there is a joint interest, the admissions of one party concerning a fact material to the joint interest are generally evidence against another joint party (*h*). Thus, an admission by an executor, *quâ* executor, is evidence against his co-executor (*i*), except perhaps under special circumstances (*k*). A receipt by one of two trustees is evidence against both of the payment (*l*).

The law is different in the case of joint contractors; for by s. 1 of Lord Tenterden's Act (*m*), it was enacted, that no joint contractor shall lose the benefit of the statute by the written acknowledgment or promise of another; though the effect of payment by one of such joint contractors is expressly reserved to continue as before the statute (*n*); but by the Mercantile Law Amendment Act, 1856 (*o*), no co-contractor or co-debtor, whether liable jointly only, or jointly and severally, will lose the benefit of the Statutes of Limitation, by reason only of payment of any principal, interest, or other money by any other co-contractor or co-debtor.

Before the acts or acknowledgment of one party can be made evidence against another, it must be proved that such a joint interest existed as creates an express or implied authority to bind (*p*). It is not enough that

(*e*) *Rapp* v. *Latham*, 2 B. & Ald. 795.
(*f*) *Wood* v. *Braddick*, 1 Taunt. 104.
(*g*) *Pritchard* v. *Draper*, 1 Russ. & My. 191.
(*h*) *Per* LE BLANC, J., in *R.* v. *Hardwick*, 11 East, at p. 589.
(*i*) *Fox* v. *Waters*, 12 A. & E. 43.
(*k*) See judgment of KAY, L.J., in *Peek* v. *Ray*, [1894] 3 Ch., p. 289.
(*l*) *Scaife* v. *Johnson*, 3 B. & C. 421.
(*m*) 9 Geo. IV., c. 14, reversing the rule laid down by Lord MANSFIELD in *Whitcomb* v. *Whiting*, 2 Doug. 652.
(*n*) *Bradfield* v. *Tupper*, 7 Ex. 27.
(*o*) 19 & 20 Vict. c. 97, s. 14.
(*p*) *Dickinson* v. *Valpy*, 10 B. & C. 128.

there should be a mere community without an actual privity of interest. In actions of tort, the admissions of one defendant will not as a general rule affect another defendant. In settlement cases, however, it has been held that the declarations of a rated parishioner are evidence against his own parish (*q*).

In cases of principal and agent, the ordinary rule applies, *Qui facit per alium facit per se*. The distinction between a general agent and a particular agent is well known. In the former case, the agent has an authority to bind his principal when acting within the scope of his authority (*r*). In the latter case, the agent has merely the authority expressly given to him by his principal, and then only on the occasions for which he was employed. Thus, it was said by an eminent judge that when it is proved that A. is general agent of B., whatever A. does, or says, or writes in the making of a contract as agent of B., is admissible in evidence because it is part of the contract which he makes for B., and therefore binds B. (*s*); and the principal's liability towards third parties cannot be restricted by any private arrangement between him and his agent (*t*). It is not necessary to call the agent to prove his admission (*u*). So evidence of an interpreter's version of an agent's language is *primâ facie* correct, and is evidence against the principal without calling the interpreter (*x*).

The admissions of an agent do not bind the principal unless they are made at the very time of the contract (*y*). Thus, a letter from an agent to his principal, containing

(*q*) *R.* v. *Hardwick*, 11 East, 578.
(*r*) *Kirkstall Brewery Co.* v. *Furness Rail. Co.*, L. R. 9 Q. B. 468; *Great Western Rail. Co.* v. *Willis*, 18 C. B. (N.S.) 748; Cockle, 177.
(*s*) *Per* GIBBS, C.J., in *Langhorn* v. *Allnutt*, 4 Taunt. 519.
(*t*) *Maddick* v. *Marshall*, 18 C. B. (N.S.) 829; *Edmunds* v. *Bushell*, L. R. 1 Q. B. 97.
(*u*) *Irving* v. *Motley*, 7 Bing. 543; *Peyton* v. *St. Thomas' Hospital*, 4 M. & R. 625, n.
(*x*) *Reid* v. *Hoskins*, 6 E. & B. 953.
(*y*) *Peto* v. *Hague*, 5 Esp. 134; Cockle, 178.

merely an account of his transactions, is not evidence against the latter (*z*); but where an agent, acting within the scope of his authority, wrote to his principals that he had received a sum of money on their account, and they replied, giving directions as to its disposition, it was held that the agent's statement was evidence that the principals had received the money (*a*). Such admissions, however, do not bind the principal if made on a subsequent occasion, or if they refer to something other than the subject-matter of the agency business (*b*). Thus, to prove possession of goods against a pawnbroker, a statement by his shopman, that it was a hard case on his master, who had advanced money on the goods, was rejected, because making such a statement was not within the scope of the shopman's authority (*c*).

Joint stock companies are bound by the admissions of their directors and other agents who are acting within the scope of their authority, unless they refer to matters *ultra vires* of the company. The secretary of a company is only its agent in so far as he is acting strictly within the powers conferred on him by the directors (*d*). If there are two principals, the statements of their agent are not evidence for one of such principals against the other (*e*).

Agency must be proved before the admissions can be received; though comparatively slight evidence is received as *primâ facie* evidence of authority. It has even been held that referring one person to another for information may make the latter an agent for the purpose (*f*). And to prove authority to sign a guarantee, evidence that the alleged agent, the defendant's son, had signed for the defendant in three or four instances and accepted bills, was held sufficient *primâ facie* evidence of

(*z*) *Langhorn* v. *Allnutt*, 4 Taunt. 511; *Admiralty Commissioners* v. *Aberdeen Steam Trawling Co.*, [1909] S. C. 335.
(*a*) *Coates* v. *Bainbridge*, 5 Bing. 58.
(*b*) Story on Agency, s. 135.
(*c*) *Garth* v. *Howard*, 8 Bing. 453.
(*d*) *George Whitechurch, Ltd.* v. *Cavanagh*, [1902] A. C. 117.
(*e*) *In re Devala Mining Co.*, 22 Ch. D. 593.
(*f*) *Williams* v. *Innes*, 1 Camp. 364; Cockle, 175.

agency (*g*). So, production of a writ purporting to be signed by the plaintiff's town agent, coupled with a receipt for the sum claimed, purporting also to be signed by such agent, was received to prove a plea of payment (*h*).

If in a criminal prosecution it is necessary to establish that an agent of the accused received certain moneys, this may be proved by the admission of that agent. Thus, on Lord Melville's trial for embezzlement, evidence of a receipt of public money by an authorised agent was admitted to show that the money was actually received (*i*).

So, where the wife of a prisoner charged with receiving stolen goods had made out a list of goods and prices at his request, and subsequently handed it to the police in his presence, it was held that such list could be given in evidence against the prisoner (*j*). But an admission of the larceny by the thief cannot be given in evidence on the trial of the receiver to prove that the goods received were stolen (*k*).

The instructions of a principal to his agent are not evidence against the other party to a contract, unless they were communicated to the latter (*l*). The admissions of an infant are generally not evidence against him (*m*); nor, generally, are the admissions of a guardian, or next friend, evidence against an infant who sues by him (*n*). But infants and their guardians and next friends are now compellable to make discovery of documents and to answer interrogatories in the same way as other litigants. An admission by the committee of a lunatic does not bind the lunatic at all (*o*).

A wife has no implied authority to make admissions in prejudice of her husband's rights, even though such rights

(*g*) *Watkins* v. *Vince*, 2 Stark. 368.
(*h*) *Weary* v. *Alderson*, 2 M. & Rob. 127.
(*i*) 29 How. St. Tr. at p. 746.
(*j*) *R.* v. *Mallory*, 13 Q. B. D. 33.
(*k*) *R.* v. *Turner*, 1 Moo. 347; *R.* v. *Smith*, 18 Cox, 470.
(*l*) *Smethurst* v. *Taylor*, 12 M. & W. 545.
(*m*) *Holden* v. *Hearn*, 1 Beav. 455.
(*n*) *Cowling* v. *Ely*, 2 Stark. 366; but see *James* v. *Hatfield*, 1 Stra. 548.
(*o*) *Stanton* v. *Percival*, 24 L. J. Ch. 309.

vested in him because he was her husband (*p*); nor can her admission of a tort committed by her be given in evidence to affect her husband in an action brought against him (*q*). Where a wife was carrying on business at a distance from her husband, it was held that her admission as to the amount of rent, and the terms of tenancy, was not evidence of those facts against him. ALDERSON, B., said:—

"A wife cannot bind her husband by her admissions, unless they fall within the scope of the authority which she may be reasonably presumed to have derived from him; and where she is carrying on a trade, if it be necessary for that purpose that she should have such a power, she may be his agent to make admissions with respect to matters connected with the trade. . . . Here it could not be necessary, for the purpose of carrying on the business of the shop, that she should make admissions of an antecedent contract for the hire of the shop" (*r*).

Whenever it can be inferred, from the antecedents of a case, that a wife had an express or implied authority, as an agent, to bind her husband, her admissions will affect him (*s*). As regards her separate property, the admissions of a married woman are on the same footing as if she were unmarried.

Admissions by a principal are not evidence against a surety, unless connected and contemporaneous with the original transaction. Thus, a surety by bond for the conduct of a clerk has been held not bound by the admissions of the clerk that he had embezzled money (*t*); nor, on a guarantee to pay for goods, is the surety bound by the admission of his principal as to delivery (*u*). Receipts in the books of a deceased collector or clerk may be evidence against a surety, as declarations in the course of business or against interest (*x*).

A similar rule holds in cases of partnership and agency, *i.e.*, that the acts or parol arrangements of a partner or

(*p*) *Alban* v. *Pritchett*, 6 T. R. 680.
(*q*) *Denn* v. *White*, 7 T. R. 112.
(*r*) *Meredith* v. *Footner*, 11 M. & W. 202.
(*s*) *Manby* v. *Scott*, 2 Smith, L. C. 446.
(*t*) *Smith* v. *Whittingham*, 6 C. & P. 78.
(*u*) *Evans* v. *Beattie*, 5 Esp. 26.
(*x*) *Middleton* v. *Melton*, 10 B. & C. 317; *Whitmarsh* v. *George*, 8 B. & C. 556.

agent, made in the ordinary course of business, bind a co-partner or principal respectively, and may therefore be given in evidence for or against him (*y*).

An admission by a person in one capacity does not bind him in another (*z*). Thus declarations by a person before he becomes an executor, administrator, or trustee, are not evidence against him as the holder of such office.

Admissions bind parties and privies, but not strangers. There are three classes of privies, viz., privies in blood (*a*) (*e.g.*, an heir in relation to his ancestor), privies by law (*e.g.*, an executor in relation to his testator), and privies by estate or interest (*e.g.*, purchaser to vendor, donee to donor) (*b*). Thus the admission of the plaintiff's father, who formerly owned the land, that he had not the right claimed by the plaintiff is admissible and can be proved even if the father be alive and present in court (*c*). The estate or interest of a privy by estate may be either legal or equitable; and therefore the admissions of a party to the record are receivable to defeat the interest of a third person, although the person is only a nominal party and trustee for the latter (*d*). It is doubtful, however, how far the admission of a *cestui que trust* can be received to defeat the claim of the trustee on the record (*e*). The admission of a tenant as to the extent of his landlord's interest does not bind his landlord. Hence, a declaration by a tenant that he was not entitled to a right of common in respect of his farm, has been held to be no evidence that such right did not belong to the landlord (*f*).

It is to be observed that the whole of a statement, whether verbal or in writing, containing an admission is to be construed together. But every part of the statement

(*y*) *Sandilands* v. *Marsh*, 2 B. & Ald. 673; *Doe* v. *Hawkins*, 2 Q. B. 212.

(*z*) *Legge* v. *Edmonds*, 25 L. J. Ch. 125.

(*a*) As to the effect, on privity in blood, of the Inheritance Act, 1833 (3 & 4 Will. IV., c. 106), see *Weeks* v. *Birch*, 69 L. T. 759.

(*b*) See Notes, 2 Smith, L. C. 12th ed., at p. 786.

(*c*) *Woolway* v. *Rowe*, 1 A. & E. 114; Cockle, 179.

(*d*) *Bauerman* v. *Radenius*, 7 T. R. 663.

(*e*) *Doe* v. *Wainwright*, 8 A. & E. 691.

(*f*) *Papendick* v. *Bridgwater*, 5 E. & B. 166; Cockle, 201.

may not have the same legal operation. Thus, in an action against a firm for goods supplied between June, 1893, and February, 1894, the only evidence that one of the defendants had ever been a member of the firm at all was a letter written by him, on January 2nd, 1893, to the manager of a bank, with whom the firm had an account, in answer to an inquiry as to whether he claimed any interest in the balance standing to the credit of the firm at the bank, which letter was as follows: "I have not banked any money this last eight months, as I have dissolved partnership with my brother last April." It was contended, for the defendant, that the admission of the partnership could not be separated from the statement of the dissolution. This the County Court judge held, but on appeal the Divisional Court held otherwise. WILLS, J., said:—

"The letter clearly contains an admission that William was a partner in Wren Brothers in April, 1892, and it must be presumed that the state of things so admitted to have existed at that date continued to exist, unless the contrary be proved. No doubt the statement that the partnership had been dissolved is evidence in the defendant's favour; but it is for the jury to say what weight is to be attached to it" (*g*).

A statement will not be inadmissible merely because portions of it contain hearsay; but the fact will be matter of comment by the judge to a jury, and he should also remind them that it is their duty to consider the whole statement, although an omission in this respect will not vitiate a verdict, if it appear that the whole admission has been otherwise brought fairly before them.

A party against whom a deed is produced has a right to insist on the whole deed being read. But a mutilated document may nevertheless be given in evidence (*h*).

Although it is a general rule that secondary evidence of a document cannot be given without accounting for the absence of the original (*i*), yet the contents of all documents may be proved by admissions, which are regarded as primary evidence thereof.

(*g*) *Brown* v. *Wren Brothers*, [1895] 1 Q. B. 390.
(*h*) *Roe* d. *Trimlestown* v. *Kemmis*, 9 Cl. & F. 775.
(*i*) See *ante*, pp. 308 *et seq.*

Thus, in the case of *Slatterie* v. *Pooley* (*k*), it was necessary to show that a certain debt was included in an insolvent's schedule. The schedule itself was tendered and rejected, because it was not duly stamped. Evidence was then tendered and rejected of a verbal admission by the defendant that the debt was included in the schedule. On a rule for a new trial, for improper rejection of this evidence, the Court held that it ought to have been received as primary evidence, PARKE, B., saying:—

"The rule as to the production of the best evidence is not at all infringed. It does not apply to the present case. That rule is founded on the supposition that a party is going to offer worse evidence than the nature of the case admits. But what is said by a party to the suit is not open to that objection. . . . We therefore think it is a sound rule that admissions made by a party to a suit may be received against him, although they relate to the contents of a written document."

This decision has been severely attacked both in England (*l*) and Ireland (*m*). But it has survived those attacks. On a similar principle, where, on an action for contribution towards money paid on a written contract, there was evidence of the express authority of the defendant to enter into the contract, of the execution thereof, and that the defendant, when informed of the amount paid, did not dispute his liability, it was held that the contract need not be put in evidence (*n*).

The rule laid down in *Slatterie* v. *Pooley* (*o*) is limited to cases in which the admission was made voluntarily by the party making it, since he cannot be compelled to make such admissions, nor ought questions which tend to elicit them to be allowed (*p*). As to informal admissions in criminal cases, see "Confessions" (*q*).

(*k*) 6 M. & W. 664; Cockle, 180. See also *R.* v. *Basingstoke*, 14 Q. B. 611.

(*l*) See Taylor, Ev. I. 310; Best, Ev. 511; Phillipps, Ev. I. 323; *Sanders* v. *Karnell*, 1 F. & F. 356.

(*m*) See *Lawless* v. *Queale*, 8 Ir. L. R. 382.

(*n*) *Chappell* v. *Bray*, 6 H. & N. 145.

(*o*) 6 M. & W. 664.

(*p*) *Darby* v. *Ouseley*, 1 H. & N. 1; but see *R.* v. *Mercerson*, 2 Stark. N. P. 366.

(*q*) See *ante*, p. 95.

CHAPTER XIII.

ESTOPPELS.

Most admissions can be withdrawn : the fact that they were made remains, but the party who made them can be heard to explain that he made them rashly and carelessly, or under an honest misapprehension, or even that he knew what he said to be false. But an admission or statement may be made in so conclusive a manner or under such special circumstances that the law will not permit the person who made it to contradict it. He is said to be estopped from denying his former statement. In other words, an estoppel is a "bar which the law sometimes sets in the way of one who is endeavouring to maintain the contrary of that which he once asserted in words, or unequivocally implied by his conduct." The rules of evidence forbid him to allege the existence of a state of things inconsistent with his previous representation, when to do so would be inequitable or contrary to the policy of the law. Neither he nor any one claiming under him can give any evidence to contradict it. This is what Lord Coke meant by his quaint definition, "An estoppel is where a man is concluded by his own act or acceptance to say the truth."

But it is always open to any party alleged to be estopped to give evidence to disprove the existence

of the facts upon which the estoppel rests. Thus he may dispute the existence of the record which is supposed to create the estoppel, or destroy its effect by showing that the judgment it records has been set aside, or that the judgment was obtained by fraud or collusion (*a*). So, too, he may prove that he never executed the deed, or that it was obtained by fraud, or duress, or otherwise tainted with illegality (*b*). Such evidence does not deny that the estoppel, if it existed, would be conclusive against him, but merely incapacitates the other party from taking advantage of the estoppel.

An estoppel is not a cause of action (*c*); no one can sue upon it. It exists only to prevent a party, whether plaintiff or defendant, from raising a particular contention in an action. If A. has been party to an action in which an issue has been decided in favour of B., or has deliberately made a statement to B. upon the faith of which B. has acted to his prejudice, neither A. nor any person claiming through or under him will be allowed, in any action between him or them and B. or any one claiming through or under B., to plead or to attempt to prove at the trial allegations which are directly contrary to the issue so decided or to the statement so made.

Estoppels are usually classed under three heads :—

I. By Record;

(*a*) *Duchess of Kingston's Case*, 2 Sm. L. C. 731.

(*b*) *Collins* v. *Blantern*, 1 Sm. L. C. 412; and see *Priestman* v. *Thomas*, 9 P. D. 70, 210; *R.* v. *Hutchings*, 6 Q. B. D. 300; and *Poulton* v. *Adjustable, etc. Co.*, [1908] 2 Ch. 430.

(*c*) Every estoppel must be specially pleaded, for it is a material fact, within Order XIX., r. 4; but it cannot be pleaded in a Statement of Claim, only in a subsequent pleading (see Odgers on "Pleading and Practice," 8th ed., p. 236).

II. By Deed; and

III. By Conduct.

I. Estoppel by Record, *i.e.*, by the judgment of a competent Court. The law allows a party ample opportunity, by way of appeal and otherwise, of upsetting a wrong decision. And if he takes the opportunity and fails, or does not choose to avail himself of it, he cannot subsequently re-open or dispute that decision. And not only the parties themselves, but also the heir, executor, administrator, and assign of each of them are bound by the decision, for, in the old phrase, they are "privy to the estoppel" (*d*).

II. *Estoppel by Deed.*—A party to a deed cannot, in any action between him and the other party, set up the contrary of his assertion in that deed. Both parties and all claiming through or under them are bound by the language of the deed. But where the recitals in a deed are obviously the statements of one party alone, he and his privies alone will be estopped by them.

III. *Estoppel by Conduct.*—This estoppel was formerly called "Estoppel *in pais*," or, more fully, "Estoppel *in pais dehors* the instrument" (*i.e.*, with regard to matters outside a record or deed). This class of estoppels obviously stands on a very different ground from the two preceding. To raise an estoppel by conduct a person must by word or conduct induce another to believe that a certain state of things exists, and so cause that other to act on that belief in a way he would not have done had he known the facts, so that if in an action between them the person making the representation were allowed to prove the true facts—to tell the truth—the other person would be prejudiced. If those two conditions are fulfilled, then the person making the representation will not be allowed to deny its truth in any action between him and the person to whom he made it or the persons who claim in the same right. But in any other action he can deny its truth.

(*d*) Estoppels resemble Admissions in this respect; see *ante*, p. 382.

"The doctrine of estoppel is that the person estopped is precluded from denying in the same transaction as that in which the estoppel arises the truth of the statement acted on" (*e*).

The ways in which a person may make such a representation are infinite. He may speak or write, act or omit to act or act negligently, but, if he says nothing, the fact that another is deceived thereby does not estop him, unless the circumstances are such that he is under a duty to speak. "Nobody ought to be estopped from averring the truth or asserting a just demand, unless" his now doing so "would work some wrong to some other person who has been induced to do something, or to abstain from doing something, by" some act, word, omission, or neglect of his (*f*).

Lastly, estoppel is a rule of civil actions. It has no application to criminal proceedings, though in such proceedings matters which in civil actions create an estoppel are usually so cogent that it would be almost useless to set up a different story.

I. ESTOPPEL BY RECORD.

This is the highest kind of Estoppel. The judgment of a competent Court, so long as it stands, binds both parties, and all claiming through or under them. This rule of evidence is based upon considerations of policy which have been embodied in three well-known maxims: "*Interest reipublicæ ut sit finis litium*"; "*Res transit in rem judicatam*"; and "*Res judicata pro veritate accipitur.*" A judgment is conclusive not only as to the point in dispute between the parties, but also as to all matters which were material to be decided as a

(*e*) *Per* CHANNELL, J., in *Compania Naviera Vasconzada* v. *Churchill & Sim*, [1906] 1 K. B. at p. 251.

(*f*) *Per* JAMES and BAGGALLAY, L.JJ., in *Ex parte Adamson, In re Collie*, 8 Ch. D. at pp. 817, 818.

basis for the decision actually arrived at (*g*). But where a judge expresses his opinion or gives a finding upon a matter of fact, when that matter of fact is not essential to his decision, such matter of fact does not thereby become *res judicata*, and such opinion or finding does not operate as an estoppel, whether treated as a judgment *in rem* or as a judgment *inter partes* (*h*).

Judgments are of two kinds—*in rem* and *in personam*. Judgments *in rem* affect the status of a person or the ownership of a thing, and bind all the world. Judgments *in personam* are only binding between the parties and their privies, be they privies in blood (*e.g.*, father and son), or in law (*e.g.*, husband and wife), or in interest (*e.g.*, vendor and purchaser).

Judgments in rem.—No perfectly satisfactory definition of a judgment *in rem* has yet been given. The chief instances in modern times are to be found in the Ecclesiastical, Admiralty, Probate, and Prize Courts (*i*); and upon questions of legitimacy, marriage, divorce, and the like. The distinction between judgments *in rem* and judgments *in personam* was laid down in *Castrique* v. *Imrie* (*k*), where BLACKBURN, J., in advising the House of Lords, said :—

"When a tribunal, no matter whether in England or a foreign country, has to determine between two parties, and between them only, the decision of that tribunal, though in general binding between the parties and privies, does not affect the rights of third parties; and if, in execution of the judgment of such a tribunal, process issues against the property of one of the litigants, and some particular thing is sold as being his property, there is nothing to prevent any third person setting up his claim to that thing, for the tribunal neither had

(*g*) See *Poulton* v. *Adjustable, etc., Co.*, [1908] 2 Ch. p. 433.
(*h*) *Concha* v. *Concha*, 11 App. Cas. 541.
(*i*) *Hughes* v. *Cornelius*, 2 Shower, 232; 2 Sm. L. C. 741.
(*k*) L. R. 4 H. L. at pp. 427—429.

jurisdiction to determine, nor did determine, anything more than that the litigant's property should be sold, and did not do more than sell the litigant's interest, if any, in the thing. All proceedings in the Courts of common law in England are of this nature, and it is every day's experience that where the sheriff, under a *fieri facias* against A., has sold a particular chattel, B. may set up his claim to that chattel either against the sheriff or the purchaser from the sheriff. And if this may be done in the Courts of the country in which the judgment was pronounced, it follows of course that it may be done in a foreign country. But when the tribunal has jurisdiction to determine not merely on the rights of the parties, but also on the disposition of the thing, and does in the exercise of that jurisdiction direct that the thing, and not merely the interest of any particular party in it, be sold or transferred, the case is very different. . . . Whatever it settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country where the question comes directly or indirectly in judgment before any other foreign tribunal. This is very familiarly known in the cases of proceedings *in rem* in foreign Courts of Admiralty, whether they be causes of prize or bottomry, or salvage or forfeiture, of which such Courts have a rightful jurisdiction founded in the actual or constructive possession of the subject-matter."

Judgments *in rem* include judgments in Courts of Admiralty in causes of prize, bottomry, salvage, forfeiture, or the like where the jurisdiction is founded on the actual or constructive possession of the subject-matter (*l*); maritime lien (*m*); condemnation of goods in Exchequer cases (*n*); the actual grant of probate or administration (*o*); or analogous decrees in foreign Courts (*p*); but not an adjudication as to the effect of a will (*q*). The condemnation of goods at the suit of the Crown is conclusive against all the world, but a conviction imposing penalties on the person committing the illegality is not, though before the same Court and concerning the same transaction (*r*). So, adjudications upon the status of persons, as, for example, decrees of nullity or divorce, create an estoppel (*s*).

(*l*) *Castrique* v. *Imrie*, L. R. 4 H. L. 428, 429.
(*m*) *Minna Craig, etc.* v. *Chartered, etc., Bank*, [1897] 1 Q. B. 460.
(*n*) *Scott* v. *Shearman*, 2 W. Bl. 977.
(*o*) *Concha* v. *Concha*, 11 App. Cas. 541.
(*p*) *In re Trufort*, 36 Ch. D. 600.
(*q*) *Whicker* v. *Hume*, 7 H. L. Cas. 124, 156.
(*r*) *Hart* v. *Macnamara*, 4 Price, 154, n.
(*s*) *Duchess of Kingston's Case*, 1 Leach, C. C. 146; *Scott* v. *Attorney-General*, 11 P. D. 128.

The decision of a Court of summary jurisdiction under the Private Street Works Act, 1892 (*t*), that a street is a highway repairable by the inhabitants at large, is a judgment *in rem* and will estop anyone else from subsequently denying that that highway is repairable by the inhabitants at large (*u*). A certificate of a judge under the Parliamentary Elections Act, 1868 (*v*), finding that a person claiming a seat has been duly elected is a judgment *in rem* (*x*), and so is an order adjudicating on the settlement of a pauper (*y*). A judgment in bankruptcy proceedings has the effect of a judgment *in rem*, but this effect it owes to the Bankruptcy Act (*z*). Judgments *in rem* are binding not only on the parties to the proceedings but upon all the world, and not only on the tribunals of the country where pronounced, but on the tribunals of other countries; but such a judgment must not have been obtained by fraud, must not carry a manifest error on its face, and must not be contrary to natural justice.

Judgments in personam.—A judgment *in personam*, or more correctly *inter partes*, also creates an estoppel; but such a judgment is conclusive only between the parties to the record and their privies. Between them the facts actually decided by a Court of competent jurisdiction cannot be again litigated (*a*). Any judgment, however (even a judgment by default), can be impeached on the ground of fraud or collusion (*b*). Hence, where a judgment *inter partes* is relied upon as an estoppel, the person against whom it is set up can impeach it on the ground of fraud, if he was not himself guilty of or privy to the fraud. Where the original action was brought

(*t*) 55 & 56 Vict. c. 57.
(*u*) *Mayor, etc., of Wakefield* v. *Cooke*, [1904] A. C. 31.
(*v*) 31 & 32 Vict. c. 125.
(*x*) *Waygood* v. *James*, L. R. 4 C. P. 361.
(*y*) *Uxbridge Union* v. *Winchester Union*, 91 L. T. 533.
(*z*) 4 & 5 Geo. V. c. 59, s. 137 (2). See *Ex parte Learoyd*, *In re Foulds*, 10 Ch. D. 3.
(*a*) *Boileau* v. *Rutlin*, 2 Ex. 665; *Jones* v. *Lewis*, [1919] 1 K. B. 328.
(*b*) *Wyatt* v. *Palmer*, [1899] 2 Q. B. 106.

in England (*c*), the person alleging fraud ought first to apply to have the judgment or order set aside on that ground. But in the case of a foreign judgment he clearly cannot do so (*d*). The judgment must have been pronounced by a Court having jurisdiction both over the persons and the subject-matter (*e*). Thus, if A. sues B. in a County Court for possession of land worth over £500 and gets judgment, B. will not be estopped, in any subsequent action, from disputing the facts (*f*). The judgment must also be final and not "interlocutory." It does not matter that it is open to appeal. A judgment on the trial of an action operates as an estoppel between the parties in a subsequent action raising a contention which is in substance *res judicata*, and not the less so because it is liable to be reversed on appeal (*g*).

"It is not competent for the Court, in the case of the same question arising between the same parties, to review a previous decision. . . . If the decision was wrong, it ought to have been appealed against" (*h*).

The principle applies to the judgments of County Courts, to judgments obtained in chambers (*i*), and to the judgments of Courts of summary jurisdiction, but the judgment of a Court of summary jurisdiction cannot operate as an estoppel (1) as to any matter as to which that Court had no authority to adjudicate directly and immediately between the parties; (2) as to any matter

(*c*) *I.e.*, in the case of an English judgment; in the case of a foreign judgment it is clear that he can from *Abouloff* v. *Oppenheimer*, 10 Q. B. D. 295.

(*d*) *Per* BRETT, L.J., in *Abouloff* v. *Oppenheimer*, at p. 306; but see the judgment of Lord COLERIDGE, C.J., *ib.*, at p. 303.

(*e*) *Per* Lord HOBHOUSE in *Attorney-General of Trinidad* v. *Eriché*, [1893] A. C. 523; *Toronto Rail. Co.* v. *Corporation of Toronto*, [1904] A. C. 809.

(*f*) *Foster* v. *Reeves*, [1892] 2 Q. B. 255.

(*g*) *Huntley* v. *Gaskell*, [1905] 2 Ch. 656; and see *Mangena* v. *Wright*, [1909] 2 K. B. 958; *Humphries* v. *Humphries*, [1910] 2 K. B. 531; *Cooke* v. *Rickman*, [1911] 2 K. B. 1125.

(*h*) *Per* Lord MACNAGHTEN in *Badar Bee* v. *Habib Merican Noordin*, [1909] A. C. at p. 623.

(*i*) *Shaw* v. *Herefordshire County Council*, [1899] 2 Q. B. 282.

incidentally coming in question, as to which a finding, if held to be conclusive between the parties, would operate in prejudice of the rights of others not parties to the proceeding; or (3) as to any incidental matter not otherwise determined than as having been the particular ground on which the Court dismissed a charge or complaint (*k*).

If a public body with powers given by statute exceeds those powers, no estoppel arises (*l*).

In bankruptcy the consideration for a judgment debt can always be inquired into (*m*), and at the instance of the judgment debtor, as well as of the trustee (*n*). This enables the registrar to refuse to make a receiving order on a judgment debt. But such a decision of the registrar does not operate to set aside the judgment or as an estoppel to prevent, on a subsequent petition, a receiving order being made based on the same judgment (*o*). The file of proceedings in a bankruptcy does not create an estoppel (*p*).

The rule formerly was that a judgment to operate as *res judicata* must have been pronounced before the commencement of the action in which it is pleaded (*q*); but a doubt has been expressed whether this is so under the present practice (*r*). A judgment by consent has the same effect by way of estoppel as any other judgment (*s*). But payment into court, with denial of liability, by a defendant sued for damages and an injunction, followed by acceptance of the money paid in, was held

(*k*) *Per* Lord SELBORNE, L.C., in *R.* v. *Hutchings*, 6 Q. B. D. 304; cf. *North Eastern Rail. Co.* v. *Dalton Overseers*, [1898] 2 Q. B. 66; *Mayor, etc., of Wakefield* v. *Cooke*, [1904] A. C. 31.

(*l*) *Islington Vestry* v. *Hornsey Urban District Council*, [1900] 1 Ch. 695.

(*m*) *Ex parte Kibble*, L. R. 10 Ch. 373.

(*n*) *Ex parte Lennox*, 16 Q. B. D. 315.

(*o*) *In re Vitoria*, [1894] 2 Q. B. 387; approved in *King* v. *Henderson*, [1898] A. C. 720.

(*p*) *Ex parte Bacon*, 17 Ch. D. 447.

(*q*) *The* "*Delta*," 1 P. D. 393.

(*r*) *Per* PEARSON, J., in *Houstoun* v. *Sligo*, 29 Ch. D. 454.

(*s*) *In re South American and Mexican Co.*, [1895] 1 Ch. 37; cf. *Shaw* v. *Herefordshire County Council*, [1899] 2 Q. B. 282.

not to estop the defendant from contesting the right to the injunction (*t*).

A judgment obtained against one of two joint debtors is a bar to proceedings against the other, whether in the same or in a subsequent action (*u*), and whether the judgment be by consent or not. And even if the judgment be set aside with the consent of the defendant, it will still be a bar to proceedings against the other joint debtor (*x*). There are four exceptions to this rule :—

(i.) Under Order XIII., rr. 4 and 6, in case of judgment in default of appearance (*y*) ;

(ii.) Under Order XXVII., r. 3, in case of judgment in default of defence ;

(iii.) Under Order XIV., r. 5, where one defendant is allowed to defend the action and the others not (*z*) ;

(iv.) In practice, a plaintiff is entitled to apply under Order XIV. against the defendants separately, where they appear separately at different times, and this is commonly done. Judgment so obtained against one defendant does not prevent the plaintiff from continuing the action against the others.

This defence must always be specially pleaded. If two joint debtors are sued in the same action, and one puts in a defence and the other consents to judgment, the first defendant should amend and plead the judgment in his defence (*a*).

A verdict and judgment, in a divorce suit brought by a husband against his wife, that she had committed adultery, is conclusive evidence thereof in a subsequent suit by

(*t*) *Coote* v. *Ford*, [1899] 2 Ch. 93.

(*u*) *King* v. *Hoare*, 13 M. & W. 494; but see *Isaacs & Sons* v. *Salbstein*, [1916] 2 K. B. 139 ; *Goldrei, Foucard & Son* v. *Sinclair*, [1918] 1 K. B. 180.

(*x*) *Hammond* v. *Schofield*, [1891] 1 Q. B. 453.

(*y*) *Pym Brothers* v. *Coyle*, [1903] 2 Ir. R. 457.

(*z*) *Weall* v. *James*, 68 L. T. 515 ; *Montgomerie* v. *Ferris*, 20 L. R. Ir. 282 ; *Walton* v. *Topakyan*, 53 W. R. 657.

(*a*) *McLeod* v. *Power*, [1898] 2 Ch. 295. As to how far a judgment against a husband or a wife is a bar to proceedings against the other, see *Morel* v. *Westmoreland*, [1904] A. C. 11 ; and see *French* v. *Howie*, [1906] 2 K. B. 674.

him against his wife for the same purpose, but with a different co-respondent (*b*). This is so even if the decree be set aside on the intervention of the King's Proctor on grounds not affecting the propriety of the verdict (*c*).

As a general rule a verdict without a judgment will not create an estoppel (*d*); hence, if a judgment, following a verdict, is afterwards set aside, the verdict falls with the judgment, and neither party can give such verdict in evidence at a second trial (*e*).

The tests whether a good estoppel exists on the ground of *res judicata* are—1st, that the issues in the two proceedings must be the same; and one of the *criteria* as to such identity is the question whether the same evidence will support both (*f*); 2nd, that the party to be affected by the estoppel must be party or privy to the former proceedings. Thus, where an action was brought by A. against B. to enforce certain debentures, and C., who had covenanted to indemnify B., assisted B. in his defence, and paid his costs when he failed, in an action to enforce the debentures subsequently brought by A. against C., the latter was held not estopped by the judgment in the former action (*g*). Where, however, a person who is not a party to the proceedings but is cognisant of them stands by and takes the benefit of the judgment, he may be estopped by his conduct from re-opening the questions covered by the judgment (*h*).

Applying these tests, we find that judgment against a man in a civil suit is not evidence against him on a criminal trial, and *vice versâ*. Where, by an act, injury is done to a man's property and also to his person, his recovering damages in an action for the injury to his

(*b*) *Conradi* v. *Conradi*, L. R. 1 P. & D. 514.
(*c*) *Butler* v. *Butler*, [1894] P. 25.
(*d*) See judgment of SMITH, L.J., in *Butler* v. *Butler*, *supra*.
(*e*) *Ibid.*
(*f*) See Lord WESTBURY'S judgment in *Hunter* v. *Stewart*, 4 De G. F. & J. 168.
(*g*) *Mercantile Investment, etc., Co.* v. *River Plate, etc., Co.*, [1894] 1 Ch. 578.
(*h*) *Wilkinson* v. *Blades*, [1896] 2 Ch. 788.

property will not be a bar to an action by him to recover damages for the injury to his person (*i*); for such separate rights give rise to distinct causes of action. But where two injuries of the same character occur to a person from the same act and in the same right, the judgment in an action brought upon one bars the right to bring an action upon the other (*k*). A judgment against a man in his individual character is not evidence against him when suing in a representative character, and *vice versâ*, because he would sue or be sued in a different right. In an action for infringement of a patent, it was declared invalid; the defendant then presented a petition for revocation of the patent, and it was held that the patentee was not estopped from setting up the validity of the patent on this petition, as the petition was really presented on behalf of the public, and was not personal to the petitioner (*l*). In an administration suit, a judgment recovered against executors, who were also trustees of the real estate, has been held not to operate against the real estate by way of estoppel, but to be *primâ facie* evidence of a debt against the persons interested in the real estate (*m*). An administratrix, who brought an action under the Fatal Accidents Act, 1846 (*n*), was held not to be estopped by the judgment thereon in a subsequent action brought by her as administratrix against the same defendants for injury to the deceased's personal estate from the same cause (*o*). And where a mortgagee, having six charges on property given by the same mortgagor, obtained a foreclosure order on five of them, omitting the sixth from his proceedings, it was held that he could commence further proceedings for foreclosure in respect of the sixth (*p*).

Where a man was improperly made a party to a suit,

(*i*) *Brunsden* v. *Humphrey*, 14 Q. B. D. 141.
(*k*) *Macdougall* v. *Knight*, 25 Q. B. D. 1.
(*l*) *In re Deeley's Patent*, [1895] 1 Ch. 687 (but see S. C. in [1896] A. C. 496).
(*m*) *Harvey* v. *Wilde*, L. R. 14 Eq. 438.
(*n*) 9 & 10 Vict. c. 93.
(*o*) *Leggott* v. *Great Northern Rail. Co.*, 1 Q. B. D. 599.
(*p*) *Bake* v. *French*, [1907] 1 Ch. 428.

but did not object to his having been joined, he was held to be estopped by the decree in that suit (*q*). A judgment against the principal debtor is not binding on a surety, unless he is a party to the action (*r*).

A judgment pronounced by a magistrate will operate by way of estoppel in his favour in proceedings subsequently taken against him for acting without jurisdiction, even though the facts creating jurisdiction are erroneously found by the judgment (*s*). A similar rule would apply to all persons when exercising judicial functions.

A judgment only operates by way of estoppel upon the point actually decided, and is not even evidence of any matter which came collaterally in question, although within the jurisdiction of the Court, or of any matter to be inferred by argument from the judgment (*t*). Thus, a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forging in an action on the bill (*u*); but when a question is necessarily decided in effect, though not in express terms, between the parties to an action, they cannot raise the same question as between themselves in any other action in any other form (*x*).

Where the decision in an action in the Chancery Division was that a compromise was invalid on the ground that a will which had been admitted to probate was a forgery, it was held that the persons to whom probate was granted were estopped from denying the will to be a forgery in a suit in the Probate Division to revoke the probate (*y*). In this case COTTON, L.J., said:—

"Although the object of the present action is different from that of the Chancery action, and although that object is not within the

(*q*) *Collier* v. *Walters*, L. R. 17 Eq. 252.
(*r*) *Ex parte Young*, *In re Kitchin*, 17 Ch. D. 668.
(*s*) *Brittain* v. *Kinnaird*, 1 Brod. & B. 432; see also *Mold* v. *Williams*, 5 Q. B. 473.
(*t*) *The Duchess of Kingston's Case*, 2 Sm. L. C. 731; Cockle, 40.
(*u*) *Per* BLACKBURN, J., in *Castrique* v. *Imrie*, L. R. 4 H. L. 434.
(*x*) *Gregory* v. *Molesworth*, 3 Atkyns, 626. See *Furness* v. *Hall*, 25 T. L. R. 233, and *Henderson* v. *Henderson*, 3 Hare, at p. 115.
(*y*) *Priestman* v. *Thomas*, 9 P. D. 210.

jurisdiction of the Chancery Division, yet, inasmuch as the point for decision here is the same and the parties are the same as in the former action, I do not think we ought to allow the question to be litigated again. The former action decided the question on which the decision in the present action must turn."

In an action for infringement of a patent, when the validity of the patent had been upheld in a previous action between the same parties, the defendants were not allowed to question the validity of the patent on fresh materials for impeaching it, which they alleged they had discovered since the previous action. A party cannot be allowed to "try his case piecemeal" (*z*).

Where the decree of a Court is capable of more than one construction, it is necessary to look at the pleadings to ascertain what was the issue which the Court intended to decide (*a*). Where a judgment roll was erroneously made up by the plaintiff, and did not represent accurately that which the jury had really found at the trial, the Court, in a subsequent action between the same parties, would not treat the judgment roll as establishing an estoppel, but admitted parol evidence of the actual finding of the jury (*b*).

Previous proceedings of a criminal or penal nature in a Court of competent jurisdiction operate as an estoppel in favour of the accused, and therefore when a person has been once convicted for, or acquitted of, an offence by a Court of competent jurisdiction, the conviction or acquittal is a bar to all further criminal proceedings for the same offence, for, as has been stated, "a man should not twice be put in jeopardy for the same offence" (*c*).

On this general principle, a verdict and conviction for non-repair of a highway estops the convicted party or parish from disputing subsequently their liability to

(*z*) *Per* ROMER, J., in *Shoe Machinery Co.* v. *Cutlan*, 13 R. P. C. 141 (in C. A., [1896] 1 Ch. 108); see *Poulton* v. *Adjustable, etc., Co.*, [1908] 2 Ch. 430; *Gillette Safety Razor Co.* v. *Gamage*, 25 T. L. R. 808.

(*a*) *Robinson* v. *Duleep Singh*, 11 Ch. D. 798.

(*b*) *Want* v. *Moss*, 70 L. T. 178.

(*c*) *R.* v. *Drury*, 18 L. J. M. C. 189.

repair the highway (*d*); but a conviction for obstructing a highway does not estop the convicted person from maintaining trespass against the prosecutor in respect of the same highway; for the proceedings are not between the same parties in respect of the same right (*e*).

Dismissal by justices of a bastardy summons on the merits is no bar to a subsequent summons under the same statute, such a dismissal being rather in the nature of a nonsuit (*f*). But if the mother appeals to the Court of Quarter Sessions, which decides against her, this decision operates as an estoppel (*g*). Where an affiliation order is made for payment during a certain period, the mother cannot after the termination of that period apply for another order (*h*). The dismissal of a summons for an affiliation order, on the ground that the defendant was not the father of the child, did not operate by way of estoppel in an action subsequently brought by the mother of the complainant for damages for seduction of her daughter, on the ground that the parties were not the same in the two proceedings (*i*).

A statute staple, statute merchant, a *cognovit actionem*, a recognisance, and every other "judicial contract" also creates an estoppel. So, too, Crown grants, letters patent, etc., are said to create estoppels by record (*k*).

Foreign Judgments.—Not only the majority of foreign judgments *in rem*, but all foreign judgments *in personam* if pronounced by a competent Court, are, for the purposes of estoppel, on a footing analogous to home judgments (*l*), provided they are final and unalterable by the Court pronouncing them (*m*), and it makes no difference

(*d*) *R.* v. *Haughton*, 1 E. & B. 501.
(*e*) *Petrie* v. *Nuttall*, 11 Ex. 569.
(*f*) *R.* v. *Machen*, 14 Q. B. 74; *R.* v. *Gaunt*, L. R. 2 Q. B. 466; *McGregor* v. *Telford*, [1915] 3 K. B. 237.
(*g*) *R.* v. *Glynne*, L. R. 7 Q. B. 16.
(*h*) *Williams* v. *Davies*, 11 Q. B. D. 74.
(*i*) *Anderson* v. *Collinson*, [1901] 2 K. B. 107.
(*k*) See *per* FRY, L.J., in *Cropper* v. *Smith*, 26 Ch. D. at p. 712.
(*l*) *Duchess of Kingston's Case*, 2 Sm. L. C. 731; *Ricardo* v. *Garcias*, 12 Cl. & F. 368.
(*m*) *Nouvion* v. *Freeman*, 15 App. Cas. 1.

that a man has appeared in a foreign Court only under the duress of wishing to protect his property (*n*). It is an important and interesting question how far a foreign judgment is liable to examination in a home tribunal. It was finally decided by the House of Lords in *Castrique* v. *Imrie* (*o*), and the Judicial Committee of the Privy Council in *Messina* v. *Petrococchino* (*p*), that the home tribunal cannot act as a Court of Appeal from the foreign tribunal, *i.e.*, a foreign judgment cannot be impeached as being erroneous on the merits, or founded on a mistake either of fact or law. Even where the law applied is English law, and a mistake of English law is apparent on its face, the judgment of the foreign Court is still binding (*q*). There still remains the question—supposing the foreign Court to have wilfully refused to apply English law, when by the comity of nations it is applicable, is its judgment then impeachable in an English Court? Lord HATHERLEY was evidently of opinion that it is (*r*), and this opinion is probably correct. A foreign judgment obtained by the fraud of a party cannot be enforced by law in England, even though the foreign Court may have decided that no fraud was perpetrated (*s*), and a foreign judgment can be impeached on the ground of fraud, even where to establish the fraud it is necessary to go into the merits of the case (*t*). Finally, it may be remarked that an irregularity in the procedure of the foreign Court does not prevent a judgment from operating by estoppel (*u*). In short, the judgment of a foreign Court will be treated as valid by an English Court until set aside by the foreign Court, unless there has been some defect in the initiation of the proceedings, or in the course of the proceedings,

(*n*) *Voinett* v. *Barrett*, 55 L. J. Q. B. 39.
(*o*) L. R. 4 H. L. 414.
(*p*) L. R. 4 P. C. 144.
(*q*) See *Godard* v. *Gray*, L. R. 6 Q. B. 139.
(*r*) See *Simpson* v. *Fogo*, 1 J. & H. 18.
(*s*) *Abouloff* v. *Oppenheimer*, 10 Q. B. D. 295.
(*t*) *Vadala* v. *Lawes*, 25 Q. B. D. 310.
(*u*) *Pemberton* v. *Hughes*, [1899] 1 Ch. 781.

which would make it contrary to natural justice to treat the foreign judgment as valid (*x*).

Where a settlement was made in England on a marriage between a Turk domiciled in England and an English lady, the former promising to reside always in England, HALL, V.-C., held that a Turkish Court could not, by a decree of divorce pronounced without notice to the wife or other persons interested under the settlement, make void the settlement (*y*). An English composition deed, made before a colonial judgment was pronounced, is no defence to an action on such judgment in an English Court, the deed not having been pleaded in the colonial action (*z*).

As previously stated, for a foreign judgment to operate by estoppel it must have been pronounced by a competent Court after due notice of the proceedings given to the defendant (*a*). An English Court, in deciding on the competence of a foreign Court, acts on the rule that the Courts of a foreign State have authority to decide all questions touching the personal status and personal property of individuals domiciled in such State (*b*). Therefore, a decree of divorce pronounced by a foreign Court in the case of parties domiciled within its jurisdiction will be recognised as valid in England, although the marriage may have been solemnised in England, and although it may have been dissolved for a cause which would not have been sufficient to obtain a divorce in England (*c*).

(*x*) *Per* VAUGHAN WILLIAMS, L.J., in *Pemberton* v. *Hughes*, *supra*.
(*y*) *Collis* v. *Hector*, L. R. 19 Eq. 334.
(*z*) *Ellis* v. *M'Henry*, L. R. 6 C. P. 228.
(*a*) *Emanuel* v. *Symon*, [1908] 1 K. B. 302; *Guiard* v. *De Clermont*, [1914] 3 K. B. 145.
(*b*) See Westlake's Private International Law, 4th ed., Chap. XVII., cf. *Schibsby* v. *Westenholz*, L. R. 6 Q. B. 155.
(*c*) *Le Mesurier* v. *Le Mesurier*, [1895] A. C. 517; *Bater* v. *Bater*, [1906] P. 209; *Harvey* v. *Farnie*, 8 App. Cas. 43; cf. *Pemberton* v. *Hughes*, [1899] 1 Ch. 781.

II. ESTOPPEL BY DEED.

The next species of estoppel is by instruments under seal; and this kind of estoppel binds both parties to the deed and those who claim under them (*d*). The principle is, that where a man has entered into a solemn engagement under his hand and seal, as to certain facts, he shall not be permitted to deny any facts which he has so asserted (*e*); but this only applies in an action or proceeding based on the deed in question; in a collateral action there is no such estoppel (*f*).

A lease is evidence for and against a lessee of the terms on which he holds, and also for or against an assignee who claims under him (*g*). So, a recital in a deed is evidence against him who executed the deed (*h*), and against every person claiming under him (*i*). But a recital must be the language of both parties to the deed to estop both. Where a recital in a deed obviously emanates from one party, that party alone will be estopped, and not the other (*k*).

There must be a positive statement of a fact in a deed or it will not operate by way of estoppel in relation to such fact (*l*). The rule is that an estoppel should be certain in every respect, and therefore the matter must be precisely and directly alleged (*m*). A receipt clause in a mortgage deed for money purporting to have been

(*d*) *Bateman* v. *Hunt*, [1904] 2 K. B. 530.
(*e*) *Per* TAUNTON, J., in *Bowman* v. *Taylor*, 2 A. & E. at p. 291.
(*f*) See judgment of WOOD, V.-C., in *Carter* v. *Carter*, 3 K. & J. at p. 644.
(*g*) *Houghton* v. *Kœnig*, 18 C. B. 235.
(*h*) *Bowman* v. *Taylor*, 2 A. & E. 278; Cockle, 48.
(*i*) *Gwyn* v. *Neath*, L. R. 3 Ex. 209; but not in favour of strangers to the deed (see *Trinidad Asphalte Co.* v. *Coryat*, [1896] A. C. 592).
(*k*) *Stroughill* v. *Buck*, 14 Q. B. 781.
(*l*) *General Finance and Discount Co.* v. *Liberator Building Society* 10 Ch. D. 15.
(*m*) *Per* Lord TENTERDEN in *Right* v. *Badinall*, 2 B. & Ad. 278.

advanced was, as against a sub-mortgagee, held to be "the simplest possible case of estoppel" (*n*). The recital in a deed of a former deed between the same parties proves, as between such parties, so much of the former deed as is recited, and no more (*o*). If a party to a deed, or his privy, attempts to set the deed aside on the ground of misrepresentation or mistake in regard to statements which happen to be embodied in the recitals, the burden of proving them to be falsehoods rests upon such party or privy who is *primâ facie* bound by such recitals or admissions (*p*).

A recital is conclusive evidence against parties only where it is distinctly antecedent to, and related to, the substance of the deed. The law on this point is thus laid down by PARKE, B., in *Carpenter* v. *Buller* (*q*):—

> "If a distinct statement of a particular fact is made in the recital of an instrument under seal, and a contract is made with reference to that recital, it is unquestionably true that as between the parties to that instrument and in an action upon it, it is not competent for the party bound to deny the recital."

A recital in a policy of insurance that a premium has been paid is conclusive against the insurance company (*r*). A covenant will not create an estoppel (*s*).

A party to a deed is not estopped from showing that it is voidable or void from fraud or illegality (*t*) or from having been executed by him while under duress or while a minor. When an educated person, who might easily have ascertained the contents of a deed, is induced to execute it by a false representation of such contents, it is doubtful whether he may not, by executing it negligently, be estopped between himself and a person who

(*n*) *Per* COZENS-HARDY, M.R., in *Powell* v. *Browne*, 97 L. T. 854. See also, on same question, *Bateman* v. *Hunt*, [1904] 2 K. B. 530.
(*o*) *Gillett* v. *Abbott*, 7 A. & E. 783.
(*p*) *Melbourne Banking Corporation* v. *Brougham*, 7 App. Cas. 307.
(*q*) 8 M. & W. 212; cf. *Lainson* v. *Tremere*, 1 A. & E. 792.
(*r*) *Roberts* v. *Security Co.*, [1897] 1 Q. B. 111.
(*s*) See *General Finance and Discount Co.* v. *Liberator Building Society*, 10 Ch. D. 15.
(*t*) *Collins* v. *Blantern*, 2 Wilson, 341; 1 Sm. L. C. 412.

innocently acted upon the faith of the deed being a valid one (*u*). The engrossment of a deed tendered for execution will operate as an admission by, but not as an estoppel against, the party tendering it (*x*).

Infants are not bound by recitals in deeds executed by their guardians (*y*). Married women are estopped by any deed which binds their separate estate and also by the recitals in any such deeds (*z*). But although a married woman is bound by estoppel *quoad* her separate estate, yet, as a legal disability cannot be evaded by estoppel, she cannot get rid of a fetter on anticipation by means of the doctrine of estoppel (*a*).

If a tenant or other limited owner grants a lease under seal for a term of years greater than he has power to grant, he is estopped, as against his tenant, from denying the validity of his lease. He creates what is called "a tenancy by estoppel," and should he afterwards acquire the fee simple he can be compelled to permit the tenant to continue in occupation for the full term. The same rule applies if such a term be created by a man who has no interest whatever in the land he professes to demise. A tenancy by estoppel gives the landlord a right to distrain; but should he take, as distress, goods which are the property not of his tenant but of a stranger, that stranger will not be estopped from asserting that the lessor had no title (*b*).

III. ESTOPPEL BY CONDUCT.

If A. by word or conduct induces B. to believe that a certain state of things exists, and B. in that belief acts in a way in which he would not have

(*u*) *Per* MELLISH, L.J., in *Hunter* v. *Walters*, L. R. 7 Ch. 75; *Howatson* v. *Webb*, [1908] 1 Ch. 1.
(*x*) *Bulley* v. *Bulley*, L. R. 9 Ch. 739.
(*y*) See *Milner* v. *Lord Harewood*, 18 Ves. 274.
(*z*) *Jones* v. *Frost*, L. R. 7 Ch. 776.
(*a*) *Bateman* v. *Faber*, [1898] 1 Ch. 144.
(*b*) *Tadman* v. *Henman*, [1893] 2 Q. B. 168.

acted unless he so believed, and is thereby prejudiced, then A. cannot in any subsequent proceeding between himself and B. or anyone claiming under B. be heard to deny that that state of things existed. But A. will not be estopped from averring the truth in any other proceeding. The estoppel only arises in favour of some person whom A. has induced by word or conduct to do or abstain from doing some particular thing.

The words may be written or spoken; the conduct may be any act, omission or neglect, provided it be an omission to do something which A. ought to do—the neglect of some legal duty which A. owes B.; provided also that such omission or neglect misleads B. and misleads him to his prejudice. Even silence may be sufficient where there is a duty to speak (*c*), and where silence will create an erroneous impression which causes B. to alter his position for the worse. But a man, who merely sleeps upon his rights, is not estopped from subsequently asserting them (*d*).

An estoppel, as we have said, is not a cause of action. Nevertheless the same representation which creates an estoppel may also be good ground for an action against the person who made it, *e.g.*, to rescind a contract induced thereby (*e*), or to recover damages in case the representation was fraudulently made.

The law on this subject is stated with great clearness and precision in the judgment of the Court in *Carr* v.

(*c*) *Lewis* v. *Lewis*, [1904] 2 Ch. 656.
(*d*) *Bristol Corporation* v. *Sinnott*, [1918] 1 Ch. 62.
(*e*) *Smith* v. *Kay*, 7 H. L. Cas. 750; *Redgrave* v. *Hurd*, 20 Ch. D. 21; *Vaughan* v. *Vanderstegen*, 2 Drew. 363; *Sharpe* v. *Foy*, L. R. 4 Ch. 35.

L. & N. W. Rail. Co. (*f*), where BRETT, J., classifies the ordinary instances of estoppel by conduct under four heads: Fraud; Intentional but Innocent Misrepresentation; Foolish but Misleading Conduct; and Culpable Negligence.

It must not be taken, however, that this classification is exhaustive; a man's conduct may give rise to estoppel in an infinite number of ways. In fact, whenever one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his previous position, the former is precluded from averring against the latter a state of things different from that which he alleged to exist (*g*). The term "wilfully" in the above rule means either that the party represents that to be true which he knows to be untrue, or that he intends his representation to be acted upon as though it were true, whether it is so or not (*h*).

One of the earliest cases on this subject is *Savage* v. *Foster* (*i*), decided in 1723, where the defendant and her husband, knowing that she was entitled in remainder on her mother's life estate, solicited her mother to make a settlement of the property as though she had an estate in fee simple. They were held to be estopped from asserting the title in remainder against the plaintiff, who had acquired the property from the person in whose favour the settlement had been made.

Where in bankruptcy proceedings a bill of sale given

(*f*) L. R. 10 C. P. 307; approved by C. A. in *Seton* v. *Lafone*, 19 Q. B. D. 68; and see *Ex parte Adamson, In re Collie*, 8 Ch. D. 807.

(*g*) *Per* Lord DENMAN, in *Pickard* v. *Sears*, 6 A. & E. 474; cf. *Attorney-General* v. *Stephens*, 1 K. & J. 724; *Gascoigne* v. *Gascoigne*, [1918] 1 K. B. 223; *Pearl Mill Co.* v. *Ivy Tannery Co.*, [1919] 1 K. B. 78; *L. & Y. Ry. Co., L. & N. W. Ry. Co. and Graeser, Ltd.* v. *MacNicoll*, 88 L. J. K. B. 601.

(*h*) *Per* PARKE, B., in *Freeman* v. *Cooke*, 2 Ex. at p. 663; Cockle, 49. Approved and followed in *M'Kenzie* v. *British Linen Co.*, 6 App. Cas. 82, where a duty was under the circumstances held to be cast on a customer of a bank to inform the bank of a forgery; but see *Squire* v. *West Australian Mortgage, etc., Co.*, [1896] A. C. 257.

(*i*) 9 Mod. 35; and see note to this case in White and Tudor, 8th ed., I., 469.

by a debtor was treated as valid with the knowledge and acquiescence of the debtor, and on that footing he obtained a release on payment of a composition to his creditors including the grantees, it was held that the debtor could not, in a subsequent action against the grantees, say that the bill of sale was invalid (*k*). It has even been suggested that a man may, by his conduct, estop himself from relying on a statutory defence to an action of contract such as a plea of the Gaming Act, 1892 (*l*). And an employer has been estopped by his conduct from setting up the statutory defence that he has received no proper notice of an accident under the Workmen's Compensation Acts (*m*). But where the defendants, a public authority, had so conducted themselves as to lead the plaintiff to believe that they were prepared to pay her reasonable compensation, and she in consequence delayed issuing the writ until the period of limitation under the Public Authorities Protection Act, 1893 (*n*), had expired, it was held they were not estopped from setting up the Act (*o*). Nor is an infant estopped from setting up the Infants Relief Act, 1874, as a defence to a claim for money lent, by the fact that he represented himself to be of full age at the time of the loan (*p*). For an estoppel cannot give capacity where it does not exist in fact.

It is not necessary that the conduct which creates an estoppel should be fraudulent; there need not be any conscious intention to mislead. As laid down in *Carr* v. *L. & N. W. Rail. Co.* (*q*):—

"If in the transaction itself which is in dispute one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable

(*k*) *Roe* v. *Mutual Loan Fund*, 19 Q. B. D. 347.
(*l*) 55 Vict. c. 9. See *per* Wills, J., in *Tatam* v. *Reeve*, [1893] 1 Q. B. at p. 48.
(*m*) *Wright* v. *Bagnall*, [1900] 2 Q. B. 240; *Turnbull* v. *Vickers, Ltd.* (1914), 7 Butterworth's Cases, 396.
(*n*) 56 & 57 Vict. c. 61.
(*o*) *Hewlett* v. *London County Council*, 24 T. L. R. 331.
(*p*) *Levene* v. *Brougham*, 25 T. L. R. 265.
(*q*) L. R. 10 C. P. at p. 318.

negligence has been the proximate cause of leading, and has led, the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards as against the first to show that the state of facts referred to did not exist."

In that case it was held that the defendants were not, under the circumstances, estopped from showing that certain goods alleged to have been delivered to them as carriers had never reached their hands, although the plaintiff had received from them advice notes for such goods (*r*). So, if a plaintiff claims to recover on the ground of estoppel a loss occasioned through the culpable neglect of the defendant, he must prove that the negligence complained of occurred in the particular transaction in which his loss arose, and also that such negligence was the proximate, direct, or real cause of the loss (*s*). This rule applies to a statement of a material fact which is untrue, even though the person making it believed it to be true (*t*); but it does not apply to a statement that something not yet in existence will come to pass, nor to a matter of intention as to the future (*u*); a promise as to the future to be binding at all must be binding as a contract (*x*). A statement of fact, whether written or oral, to operate as an estoppel, must be clear and unambiguous (*y*).

The result of the authorities on the above points was thus stated by KAY, L.J., in the case of *Low* v. *Bouverie* (*z*) :—

(*r*) But see *Coventry* v. *Great Eastern Rail. Co.*, 11 Q. B. D. 776; and *Compania Naviera Vasconzada* v. *Churchill*, [1906] 1 K. B. 237, where shipowners were estopped from denying to a purchaser of goods shipped that they had been shipped "in good order and condition," as acknowledged by their captain in the bill of lading.

(*s*) *Longman* v. *Bath Electric Tramways, Ltd.*, [1905] 1 Ch. 646.

(*t*) See Lord SELBORNE'S judgment in *Vagliano* v. *Bank of England*, [1891] A. C. 107.

(*u*) *Bank of Louisiana* v. *Bank of New Orleans*, 43 L. J. Ch. 269; cf. *Jorden* v. *Money*, 5 H. L. Cas. 185; and *George Whitechurch, Limited* v. *Cavanagh*, [1902] A. C. 117.

(*x*) *Maddison* v. *Alderson*, 8 App. Cas., at p. 473.

(*y*) *Low* v. *Bouverie*, [1891] 3 Ch. 82; cf. *Colonial Bank* v. *Cady*, 15 App. Cas. 267; *Fuller* v. *Glyn, Mills, Currie & Co.*, [1914] 2 K. B. 168.

(*z*) *Supra*. In this case a trustee was held not to be estopped by his conduct concerning the trust estate. Other cases concerning

"(1) There has been from ancient time a jurisdiction in Courts of Equity in certain cases to enforce a personal demand against one who made an untrue representation, upon which he knew that the person to whom it was made intended to act, if such person did act upon the faith of it and suffered loss by so acting. (2) This was readily done where the representation was fraudulently made, in which case an action of deceit would lie at law. (3) Relief would also be given at law and in equity, even though the representation was innocently made without fraud, in all cases where the suit will be effective if the defendant is estopped from denying the truth of his representation. (4) Where there is no estoppel, an innocent misrepresentation will not support an action at law for damages occasioned thereby. (5) Estoppel is effective where an action must succeed or fail, if the defendant or plaintiff is prevented from disputing a particular fact alleged."

The following are among the most important illustrations of estoppel by conduct :—

(1) A tenant, during his possession of the premises, cannot deny that the landlord, under whom he has entered or to whom he has paid rent, had title at the time of his admission ; and this rule extends to the case of lodgers. "The security of landlords would be infinitely endangered if such a proceeding were allowed" (*a*). And even if a tenant consents to give up possession to a person claiming to be the landlord, such person is estopped as the tenant would have been from disputing the landlord's title (*b*). So, where a person had dealt with property as an executor *de son tort*, his payment of rent to the superior landlord was held to estop him from denying his liability as assignee to perform the covenants in the lease (*c*). Nevertheless a tenant, although he cannot be permitted to prove that his landlord had no title at the time of entry, may show that his title has expired (*d*), and may prove that a parcel of land, about which he and the lessor are disputing, was never comprised in the lease at all (*e*). When a tenant took a lease of land from a coparcener who

trustees are *Porter* v. *Moore*, [1904] 2 Ch. 367 ; and *Lewis* v. *Lewis*, [1904] 2 Ch. 656.

(*a*) *Per* Lord Ellenborough, in *Balls* v. *Westwood*, 2 Camp. 12.

(*b*) *Doe* v. *Mills*, 2 A. & E. 17.

(*c*) *Williams* v. *Heales*, L. R. 9 C. P. 171.

(*d*) *England* v. *Slade*, 4 T. R. 682 ; cf. *Langford* v. *Selmes*, 3 K. & J. 220. See *Serjeant* v. *Nash, Field & Co.*, [1903] 2 K. B. 304.

(*e*) *Per* Lord Blackburn in *Clark* v. *Adie*, 2 App. Cas. 435.

was only entitled to a portion of the rents and profits, he was held estopped from denying the title of the heir and privy in blood of the lessor to the whole land (*f*). Conversely, a landlord who has granted a lease is estopped from alleging his want of title, and this whether the lease is by deed or not. But where a corporation had granted a new lease, in consideration of the surrender of an old lease, and the new lease was invalid because the consent of the Local Government Board had not been obtained, it was held that they were not estopped from showing that the surrender was thereby rendered inoperative (*g*). Payment of rent and receipt of rent alike raise strong presumptions of tenancy, but do not operate by way of estoppel; for, when a tenancy is attempted to be established by mere payment of rent, without any proof of an actual demise or of the tenant's having been let into possession by the person to whom the payment was made, evidence is always admissible on the part of the tenant to explain the payment of rent and to show on whose behalf such rent was received (*h*); or to show that it was made under a supposed legal obligation which did not exist (*i*).

(2) A bailee is estopped from denying that his bailor had, at the time the bailment was made, authority to make it (*k*). But when the bailee is evicted by title paramount, he can set up that title against the bailor with the consent of the person whose title is set up (*l*).

(3) A licensee is estopped from denying the title of the licensor to grant the licence. So, a person who enters on land by the licence of the party in possession is estopped from denying the latter's title to possession (*m*). And a licensee of a patent cannot dispute the title of the patentee; but a licensee can show that what he has done

(*f*) *Weeks* v. *Birch*, 69 L. T. 759.
(*g*) *Canterbury Corporation* v. *Cooper*, 99 L. T. 612.
(*h*) *Per* PATTESON, J., in *Doe* v. *Francis*, 2 M. & Rob. 57.
(*i*) *Batten Pooll* v. *Kennedy*, [1907] 1 Ch. 256.
(*k*) *Gosling* v. *Birnie*, 7 Bing. 339.
(*l*) *Biddle* v. *Bond*, 6 B. & S. 225; *Rogers* v. *Lambert*, 24 Q. B. D. 573.
(*m*) *Doe* v. *Baytop*, 3 A. & E. 188.

does not fall within the ambit of the patent (*n*), and for this purpose he may refer to former patents to show what is a proper construction of his licensor's patent (*o*). He can of course prove that the patent has come to an end (*p*). A patentee is not estopped from disputing the validity of the patent as against his assignee, except where it is proved that the assignee bought on the faith of the statements in the patentee's petition to the Crown (*q*).

(4) And, generally, any agent entrusted with the possession or management of property is estopped from denying the title of his principal (*r*).

(5) The acceptor of a bill of exchange is, by s. 54 of the Bills of Exchange Act, 1882 (*s*), precluded from denying to a holder in due course—

"(a) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill; (b) in the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement; (c) in the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement."

So, too, if the bill be drawn by procuration, he cannot deny the authority of the agent to draw the bill in the name of his principal (*t*); but he can deny the authority of the agent to indorse (*u*).

By s. 55 the drawer of a bill is precluded from denying to a holder in due course—

"the existence of the payee and his then capacity to indorse";

and the indorser of a bill is precluded from denying to a holder in due course—

"the genuineness and regularity in all respects of the drawer's signature and all previous indorsements";

(*n*) *Clark* v. *Adie*, 2 App. Cas. 423.
(*o*) *Couchman* v. *Greener*, 1 R. P. C. 197.
(*p*) *Muirhead* v. *Commercial Cable Co.*, 11 R. P. C. 317.
(*q*) *Cropper* v. *Smith*, 26 Ch. D. 700.
(*r*) *Dixon* v. *Hamond*, 2 B. & Ald. 310; *Evans* v. *Nichol*, 3 Man. & G. 614; *Roberts* v. *Ogilby*, 9 Price, 269.
(*s*) 45 & 46 Vict. c. 61.
(*t*) *Sanderson* v. *Collman*, 4 Man. & G. 209.
(*u*) *Robinson* v. *Yarrow*, 7 Taunt. 455.

and also is precluded from denying to an indorsee—

"that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto."

A statement that the signature to a bill is genuine made to the plaintiff after the bill had been indorsed to him will not estop the declarant from setting up that the bill is a forgery (*x*), for the statement does not cause the plaintiff to alter his position at all (*y*); and the payment of a bill upon which a man's acceptance has been forged does not make him liable to pay a second similarly forged acceptance, even though he has not repudiated his liability on the first (*z*). The acceptor of a bill of exchange is under no duty to take precautions against the fraudulent alteration of a bill after acceptance, and therefore is not estopped from relying on any such fraudulent alteration (*a*). But if a customer of a bank by the neglect of due caution causes his bankers to pay a forged order, he cannot set up the invalidity of a document upon which he has induced them to act as genuine (*b*). Where the holder of a negotiable instrument is not a holder for value, the drawer is not estopped from saying as against him that the body of the instrument has been wrongly filled up (*c*).

(6) Mere acquiescence may sometimes create an estoppel. Where a party, having an interest in property, stands by and permits another to deal with it as the absolute owner, and as if no such interest existed in himself, he will not be permitted to assert such interest

(*x*) *Brook* v. *Hook*, L. R. 6 Ex. 89.

(*y*) *Kelly* v. *Solari*, 9 M. & W. 54; *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49.

(*z*) *Morris* v. *Bethell*, L. R. 5 C. P. 47.

(*a*) *Scholfield* v. *Earl of Londesborough*, [1896] A. C. 514; followed in *Colonial Bank of Australasia* v. *Marshall*, [1906] A. C. 559; distinguished in *London Joint Stock Bank, Ltd.* v. *Macmillan and Arthur*, [1918] A. C. 777.

(*b*) See *Young* v. *Grote*, 4 Bing. 253, and the judgment of Lord MACNAGHTEN in *Scholfield* v. *Earl of Londesborough*, *supra*. Other cases on estoppel concerning bills and cheques are *Lloyd's Bank* v. *Cooke*, [1907] 1 K. B. 794; *Smith* v. *Prosser*, [1907] 2 K. B. 735; *Glenie* v. *Tucker*, [1908] 1 K. B. 263; *Kepitigalla Rubber Estates* v. *National Bank of India*, 78 L. J. K. B. 964.

(*c*) *Paine* v. *Bevan and Bevan*, 110 L. T. 933.

against those with whom the apparent owner has dealt. This doctrine was much discussed in the case of *Ramsden* v. *Dyson* (*d*), when the following canons were laid down:—

"(i.) If a stranger begins to build on land supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a Court of equity will not afterwards allow the real owner to assert his title to the land. (ii.) But if a stranger builds on land knowing it to be the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditure upon it. (iii.) So if a tenant builds on his landlord's land, he does not, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined."

And Lord KINGSDOWN, affirming the principles of the case of *Gregory* v. *Mighell* (*e*), laid down the following rule:—

"If a man under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation."

But the party standing by will not be bound, unless he was aware of his rights at the time (*f*). So, where a wife allows her husband to spend the income of her separate estate, he is not accountable to her afterwards for it (*g*); nor can she recover any portion thereof after his death. When an insurer of a ship has accepted notice of abandonment, with full knowledge of the facts of the loss, he is estopped from afterwards denying a total loss or relying on a breach of warranty (*h*).

Again, whenever a person obtains possession of land, claiming under a will or deed, he cannot afterwards set up another title to the land against the will or deed,

(*d*) L. R. 1 H. L. 129.
(*e*) 18 Ves. 328.
(*f*) *Per* FRY, J., in *Wilmott* v. *Barber*, 15 Ch. D. 105.
(*g*) *Smith* v. *Lord Camelford*, 2 Ves. 716.
(*h*) *Provincial Insurance Co.* v. *Leduc*, 22 W. R. 939.

though the will or deed did not operate to pass the land in question, and any person who gains possession through a person interested in the land under the will or deed is equally estopped (*i*).

When a person, by holding himself out as a shareholder, induces a company to register him as such, he cannot deny that he is a shareholder in an action on such shares (*k*). Where a company, under circumstances which made it doubtful whether an agreement was binding on its shareholders, transferred its business to a new company, one of the terms of the agreement being that the shareholders in the old company should receive shares in the new company, and share certificates were sent to all the shareholders in the old company, it was held that a shareholder who had acknowledged the receipt of and retained the certificates was a shareholder in the new company; but that one who had taken no notice of the communication was not a shareholder (*l*). In this case Lord HATHERLEY said:—

"No authority can be found for holding that a person, by simply doing nothing, may be rendered liable. The mere fact of standing by and being told there is something done which you have not authorised cannot fix you with the heavy liabilities which shares in a joint stock company would create."

A company, by issuing a share certificate representing a person to be a holder of certain shares, is estopped, as against another person who *bonâ fide* acts upon the faith of the representation, from denying the truth of the share certificate (*m*), including the statement, if any, that the shares are fully paid up (*n*). The estoppel does not give a title to the shares or make the person in whose favour it

(*i*) *Per* LOPES, L.J., in *Dalton* v. *Fitzgerald*, [1897] 2 Ch. 86; but see *In re Anderson*, [1905] 2 Ch. 70.

(*k*) *Sheffield Rail. Co.* v. *Woodcock*, 7 M. & W. 574.

(*l*) *Challis's Case*, L. R. 6 Ch. 266; cf. *Bank of Hindustan* v. *Alison*, L. R. 6 C. P. 222.

(*m*) *In re Bahia, etc., Rail. Co.*, L. R. 3 Q. B. 584. Approved by the House of Lords in *Balkis Consolidated Co.* v. *Tomkinson*, [1893] A. C. 396; and see *Dixon* v. *Kennaway*, [1900] 1 Ch. 833.

(*n*) *Burkinshaw* v. *Nicolls*, 3 App. Cas. 1004; *Bloomenthal* v. *Ford*, [1897] A. C. 156.

arises a shareholder, but prevents the company from setting up that he is not a shareholder in an action for damages for not registering him as a shareholder (*o*).

No estoppel arises where the person acting on the certificate knows the true state of the facts (*p*). But estoppel arises where, if the person to whom the statement is made had thought about it, he would have seen it was not true (*q*). In one case a purchaser of shares from a person, who had become the registered holder by means of a forged transfer, was held to be entitled to compensation from the company in the event of his being compelled to re-transfer to their proper owner; since, by holding out the seller as the registered owner, they were estopped from denying him to be so after the purchaser had acted upon such representation (*r*). Again, where a person, after receiving a certificate of the registration of some shares, repaid to the vendor the amount of a previous call, on the faith of the certificate, the company were held estopped by the certificate, and liable for the value of the shares (*s*). In 1884 a company was held estopped by a certificate issued by their secretary, although he had wrongfully affixed their seal and had forged a director's signature (*t*). But in a subsequent case, where the secretary had fraudulently affixed the seal to a certificate and forged the signatures of two directors, the House of Lords held that there had been no such negligence by the company as to fix them with responsibility for his acts, and they were not bound by the certificate (*u*). It is only the person in whose favour the estoppel exists that can render the company liable on it (*x*). A "certification" issued by a company

(*o*) *Balkis Consolidated Co.* v. *Tomkinson*, [1893] A. C. 396.
(*p*) *In re London Celluloid Co.*, 39 Ch. D. 190.
(*q*) *Per* Lord HERSCHELL in *Bloomenthal* v. *Ford*, [1897] A. C. 156.
(*r*) *In re Bahia, etc., Rail. Co.*, L. R. 3 Q. B. 584.
(*s*) *Hart* v. *Frontino Mining Co.*, L. R. 5 Ex. 111.
(*t*) *Shaw* v. *Port Philip Colonial Gold Mining Co.*, 13 Q. B. D. 103.
(*u*) *Ruben and Another* v. *Great Fingall Consolidated*, [1906] A. C. 439.
(*x*) *Simm* v. *Anglo-American Telegraph Co.*, 5 Q. B. D. 188.

estops them from denying the facts certified (*y*); but where the secretary of a company having authority to certify on behalf of the company certified a transfer of shares without having received the certificates, the company were not estopped by the certification (*z*). A "certification" is not under the seal of the company whereas a share certificate is, and the estoppel arising from a wrongful use of a company's seal is not governed by precisely the same considerations as an estoppel from the fraudulent acts of a company's agent.

Where commissioners were empowered by a local Act to issue mortgage securities, it was held that they could not, as against a *bonâ fide* holder for value, set up an illegality in the issue of a security, but were estopped from denying its validity (*a*). A company cannot rely on an informality in the issue of their debentures as an answer to a petition for winding up (*b*). Where a company registered an assignment of debentures, it was held that they could not equitably set off against the transferee any claim against the transferor (*c*). This doctrine was extended to a case where there was no registration; for, a company having received notice of an assignment for value of one of their debentures, and acknowledged the receipt by stamping the duplicate notice, it was held that such stamping estopped them from setting up against the transferee any equities attaching between themselves and the transferor (*d*).

But although a company may be estopped from questioning the validity of certain of the debentures issued by it, the holders of the other debentures are not so estopped (*e*).

(*y*) *Bishop* v. *Balkis Consolidated Co.*, 25 Q. B. D. 512.
(*z*) *George Whitechurch, Limited* v. *Cavanagh*, [1902] A. C. 117.
(*a*) *Webb* v. *Herne Bay Commissioners*, L. R. 5 Q. B. 642.
(*b*) *In re Exmouth Dock Co.*, L. R. 17 Eq. 181.
(*c*) *Higgs* v. *Northern Assam Tea Co.*, L. R. 4 Ex. 387; followed by Lord ROMILLY in *In re Northern Assam Tea Co.*, L. R. 10 Eq. at p. 463; cf. *In re General Estates Co.*, L. R. 3 Ch. 758.
(*d*) *Brunton's Case*, L. R. 19 Eq. 302. As the right of a company to question securities irregularly issued, see the judgment of KAY, J., in *In re Romford Canal Co.*, 24 Ch. D. at pp. 92, 93.
(*e*) *Mowatt* v. *Castle Steel, etc., Co.*, 34 Ch. D. 58.

Where a person possessed of a security, purporting on the face of it to be transferable by delivery, leaves such security in the hands of another, who hands it over to a *bonâ fide* holder for value, the owner of the security cannot set up as against the *bonâ fide* holder that it was not so transferable (*f*). Where a person executed transfers of shares and left them in the hands of his brokers, who raised money on them, it was held that he was estopped from making any claim in respect thereof as against the lenders (*g*).

Liability for the debts of a firm may arise by estoppel. This liability is thus defined by the Partnership Act, 1890 (*h*), s. 14:—

"(1) Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.

(2) Provided that where after a partner's death the partnership business is continued in the old firm-name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executor's or administrator's estate or effects liable for any partnership debts contracted after his death."

Therefore, if a person retires from a partnership, but omits to give proper notice of dissolution, he may be liable for debts incurred in the subsequent carrying on of the business by a new firm; but he cannot be sued jointly with the new firm, and if the new firm be sued for such a debt, the retiring partner cannot afterwards be sued (*i*).

"If a man allows his name to be held out to the public as being the person responsible for the transaction in question he may be liable in consequence of this holding out, or in consequence of his conduct, although he may not have originally authorised the act,

(*f*) *Goodwin* v. *Robarts*, 1 App. Cas. 476; *Rumball* v. *Metropolitan Bank*, 2 Q. B. D. 194.

(*g*) *Bentinck* v. *London Joint Stock Bank*, [1893] 2 Ch. 120.

(*h*) 53 & 54 Vict. c. 39.

(*i*) *Scarf* v. *Jardine*, 7 App. Cas. 345.

because he has not taken steps which he should take to stop the unauthorised use of his name " (*k*).

It is usually said, on the authority of Lord COKE, that where estoppels conflict they neutralise one another. " Estoppel against estoppel sets the matter at large." But, as pointed out by PARKER, J., in *Poulton* v. *Adjustable, etc., Co.* (*l*), it is difficult to imagine any case in which such an event would happen. If, however, by any chance two estoppels were found to conflict, there is very little doubt that the rule laid down by Lord COKE would apply.

(*k*) *Per* BYRNE, J., in *Walter* v. *Ashton*, [1902] 2 Ch. at p. 294.
(*l*) [1908] 2 Ch. at p. 432.

BOOK III.

COGENCY.

CHAPTER I.

WEIGHT OF EVIDENCE.

THE term "legal evidence" includes all means of ascertaining the truth which our law sanctions and our Courts adopt. While treating of Relevancy, we have defined the matters which a litigant will be permitted to lay before the tribunal in any legal proceeding. When dealing with Proof, we have discussed the methods by which such matters can be legitimately established. We will now assume that a certain number of relevant facts have been proved by proper evidence.

Proof is the result of evidence, but it is not always easy to say how much evidence or what kind of evidence will amount to proof. Much worthless evidence, no doubt, is given in our Courts—if only for this reason, that no one can tell that it is worthless before it is heard. The judge has no power to exclude any evidence which is legally admissible merely because he does not think it will be of much use.

The admissibility of evidence is one thing: its value, when admitted, another. This distinction

is clearly pointed out by JESSEL, M.R., in a case (*a*) where it was sought to exclude a declaration made against interest, on the ground that in one way it told in favour of the interest of the declarant. He said:—

"The question of admissibility is not a question of value. The entry may be utterly worthless when you get it, if you show any reason to believe that he had a motive for making it, and that though apparently against his interest, yet really it was for it; but that is a matter for subsequent consideration when you estimate the value of the testimony."

It is the duty of the jury, or of the judge sitting alone, to take into consideration every piece of evidence which has been admitted and proved in Court, and to give it such weight as they or he may think it deserves.

Absolute certainty is unattainable in any of the affairs of daily life. The exigencies of public and private business limit the inquiries held in our law courts, both as to the time which they occupy and as to the extent of the matter investigated. The fallibility of human testimony and the passions and prejudices of mankind are other circumstances which sometimes prevent the tribunal from arriving at a decision with absolute precision. Juries are naturally prone to accept the evidence of any witness who is neither shaken under cross-examination nor contradicted by evidence equally reliable.

We have already referred to the well-known rule that the law requires the "best evidence" to be given. But this rule, in modern times at all events, applies rather to the admissibility than to

(*a*) *Taylor* v. *Witham*, 3 Ch. D. 605.

the cogency of evidence. The law often permits a relevant fact to be proved in more ways than one; it by no means follows that all these ways are equally cogent. Very different values may properly be attached to them. The fact that a litigant employs one species of admissible evidence, and does not employ others which are usual and readily available, naturally provokes the inquiry, Why has he resorted to a more remote and less convincing method of proof? and suggests the answer that the more usual method is purposely avoided because it would not tell in his favour.

Thus, if it is alleged that a material document was written by A. and A. denies this, evidence of a man who has seen him write only once, or even of an expert who has never seen him write at all, is as admissible as that of A. himself or of his near relatives, friends, partners, or employees (*b*). But it cannot be contended for a moment that all these different kinds of evidence will be of equal value in determining the question. So, too, as we have seen (*c*), evidence of reputation, entries in a family Bible, etc., can be given in evidence, for what they are worth, to prove a marriage. But if the marriage is alleged to have taken place since the Registration of Marriages Act came into force, no one would attach much value to such evidence if the ordinary marriage certificate be not produced, or its absence satisfactorily explained.

In the administration of justice, as in ordinary life, we often have to deal with competitive probabilities. The tribunal must not look for more than what is called a "moral certainty"; it should

(*b*) See *ante*, pp. 45, 46.
(*c*) See *ante*, p. 302.

not act on a mere possibility. But a large field lies between these two extremes. The whole object of evidence is to create a conviction in the mind of a reasonable and practical man; and such conviction must be based upon the facts proved by express evidence, and on the inferences which naturally and probably arise from them. Belief should always be the reasonable result of facts; a theory should always be the true explanation of actual experience. Hence, whenever it is sought to establish a theory by circumstantial evidence, all the facts proved must be consistent with the theory.

The party upon whom in any action the burden of proof rests must bring forward some evidence to sustain that burden. He must bring forward sufficient evidence to create a strong probability that the facts which he alleges in his pleadings actually occurred. Such evidence is called *primâ facie* evidence; and if given may be accepted by the tribunal as sufficient, unless the opposite party adduces evidence to the contrary. In other words, *primâ facie* evidence shifts the burden of proof. It is a question in each case what weight is to be attached to the evidence, whether it be contradicted or not; for it is seldom conclusive. As a rule, however, very little affirmative evidence will be held sufficient where the facts lie almost entirely within the knowledge of the other side (*d*). There is a difference, too, as we have seen, in the degree of proof required in civil and in criminal cases;

(*d*) See, for instance, *General Assurance, etc., Corporation* v. *Robertson*, [1909] A. C. 404; *Hollis* v. *Young*, [1909] 1 K. B. 629. For a stronger statement by BAYLEY, J., see *R.* v. *Turner*, 5 M. & S. at p. 211.

for civil cases may be decided on a preponderance of probability, but in criminal prosecutions the guilt of the prisoner must be established beyond "reasonable doubt."

Direct and Circumstantial Evidence.

The question often arises, which is the more cogent—direct, or circumstantial evidence? When the evidence tendered directly establishes the fact in issue, it is called direct. Thus the evidence of a bystander who saw the occurrence is direct oral evidence of the events which happened. A deed is direct documentary evidence of the interests of which it disposes; and a hedge and ditch are direct real evidence of the boundary between two fields. But when the fact in issue, or some part of it, is presented by means of some minor evidentiary facts which, though not themselves constituting any part of the fact in issue, throw light upon it, and from which some inference may be drawn as to the existence or non-existence of the fact in issue, the evidence is said to be circumstantial. It must not be too remote from the issue: the line is drawn "when the importance of the fact to be proved is wholly disproportionate to the extent of the inquiry." And the minor evidentiary facts which together constitute the circumstantial evidence must each in its turn be established by separate direct proof.

The direct evidence of a bystander who saw with his own eyes what was done is *primâ facie* the more reliable, unless there is any reason for doubting either his veracity or his powers of observation. Yet a jury is often loth to convict a prisoner on the uncorroborated evidence of one man. In criminal cases juries undoubtedly prefer to have the fact proved by direct evidence; but if the circumstantial evidence dovetails well together, and raises a violent presumption of the prisoner's guilt, then it will be as cogent as direct evidence.

The advocates of direct evidence say that in this the

liability to err is little. The tribunal has only to consider whether the witnesses are telling the truth; whereas in circumstantial evidence it has to arrive at truth through two preliminary considerations: are the witnesses telling the truth? and if so, can the fact to be proved be rightly inferred from the circumstances proved? The advocates of circumstantial evidence say: witnesses can lie, but circumstances cannot; therefore this evidence is better than direct evidence. "The coincidences of truth are innumerable," as Paley has it. But really the value of these two kinds of evidence depends upon the facts of each case. Sometimes circumstances lie in a more dangerous fashion than men, and the coincidences of error, the fortuitous concourse of events, *may sometimes* give an air of truth to an absolutely false charge against a person. Examples of this may be found in the history of all countries. Still, it is easier to read circumstances aright than to probe the infinite variety and complexity of human motives and emotions which may distort the truth.

In *R.* v. *Burdett* (*e*), ABBOTT, C.J., said:—

"A presumption of any fact is properly an inference of that fact from other facts that are known; it is an act of reasoning: and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could thus be ascertained by inference in a Court of law, very few offenders could be brought to punishment. In a great portion of trials, as they occur in practice, no direct proof that the party accused actually committed the crime is or can be given: the man who is charged with theft is rarely seen to break the house or take the goods; and in cases of murder, it rarely happens that the eye of any witness sees the fatal blow struck, or the poisonous ingredients poured into the cup. In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded either of explanation or contradiction."

Lord STOWELL, in a case where adultery was alleged, said (*f*):—

"It is a fundamental rule that it is not necessary to prove the direct fact of adultery, because, if it were otherwise, there is not

(*e*) 4 B. & Ald. at p. 161.
(*f*) *Loveden* v. *Loveden*, 2 Hagg. Cons. at p. 2.

one case in a hundred in which that proof would be attainable; it is very rarely indeed that parties are surprised in the direct act of adultery. In every case almost, the fact is inferred from circumstances that lead to it by a fair and necessary conclusion; and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights. . . . The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations; neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man. The facts are not of a technical nature; they are facts determinable upon common grounds of reason; and Courts of justice would wander very much from their proper office of giving protection to the rights of mankind, if they let themselves loose to subtleties and remote and artificial reasonings upon such subjects. Upon such subjects the rational and the legal interpretation must be the same."

Oral, Documentary, and Real Evidence.

The testimony of witnesses is the most usual method of proof. Unless the facts are agreed or admitted, so that the case depends entirely upon a point of law, it is, in practice, impossible for a plaintiff to conduct a case without calling witnesses, for both documentary and real evidence require some oral evidence to show their relation to the matters in issue.

Oral testimony, however, is limited by the lifetime of the witness; documentary and real evidence, on the other hand, in the ordinary course of nature will probably last until the need for producing them has ceased. To show that a witness is dead is a conclusive reason for not calling him; but to show that a document or thing no longer exists leads to comment, for it may have been destroyed for the express purpose of preventing it from being put in evidence. The person who should have produced it must account satisfactorily for its non-production.

The evidence of witnesses, however, raises so many difficult and important questions that the whole of the following chapter is devoted to the discussion of its cogency.

We will, however, deal here with the question, When both documentary and oral evidence are before the Court, which is entitled to more weight?

A judge as a rule regards a document as of higher authority. A jury likes to see the witnesses. But both would agree that documentary evidence is of great use in checking and explaining oral. It is extremely valuable when the oral evidence is conflicting. The correspondence that passed between the parties before the quarrel began is of especial importance. Again, documentary evidence is useful to refresh the memory of a witness. Documents not otherwise admissible may be used for this purpose. But they must be documents which were written or dictated by that witness shortly after the event which they record, or which if written by someone else, were read and approved shortly after the event (*g*).

Real evidence is addressed directly to the senses of the tribunal, and is therefore more satisfactory and reliable than verbal descriptions of an object given by witnesses. But the great danger of this kind of evidence, especially when put before a jury, is that the tribunal will jump to a conclusion before any evidence has been given to establish the connection between the object produced and the issue to be tried. The production of a bloody weapon or the exhibition of a grievous wound may so excite the passion or the sympathy of a jury as to cause them to lose sight of the necessity of establishing a clear connection between such matters and the crime in question. They may jump to an erroneous conclusion as readily as did the patriarch Jacob, when, at the sight of Joseph's coat of many colours, he exclaimed, "It is my son's coat; an evil beast hath devoured him. Joseph is without doubt rent in pieces." But, when real evidence is dealt with strictly, and kept within its proper sphere, it may be fairly said to be the most reliable that can be had.

In some cases production of physical objects may be actually required by the Court. For instance, in cases

(*g*) See *ante*, p. 151.

of larceny, the Court usually insists upon the stolen property being produced, if it has been found. But generally production is not insisted on, or legally required, although in many cases non-production would provoke comment or suspicion (*h*).

Primary and Secondary Evidence.

We have defined secondary evidence as that which by its very nature shows that better evidence is or once was in existence; it follows that it must have less probative force than that better evidence the existence of which it connotes. Let us deal first with hearsay—that is, with secondary oral evidence. Here all the ordinary sanctions of truth (*i*) are missing.

The real author of the statement reported is not present in Court, is not on oath, and is not subject to cross-examination; and it is a fundamental principle of our law that evidence has no claim to credibility unless it be given on oath, or what is equivalent to an oath, and unless the party to be affected by it has an opportunity of cross-examining the witness. Hence, hearsay or second-hand evidence has always been regarded as inferior to original, as a guide to truth. When a witness states something, which he himself has either seen or heard, his statement contains clearly the requisite elements of presumptive truth; but when he states something which he has heard from another person, his statement is obviously less reliable and satisfactory. A multitude of probable contingencies diminish its value. The witness may have misunderstood or imperfectly remembered, or even may be wilfully misrepresenting the words of the third person; or the latter may have spoken hastily, inaccurately, or even falsely. He may have been "a person whom no one who knew him would believe for a moment" (*k*).

(*h*) *R.* v. *Francis*, L. R. 2 C. C. R. 128; *R.* v. *Hunt*, 3 B. & Ald. 566; *Armory* v. *Delamirie*, Strange, 505.

(*i*) See *post*, p. 430.

(*k*) See the judgment of CAVE, J., in *Scott* v. *Sampson*, 8 Q. B. D. pp. 506, 507.

Again, secondary documentary evidence has much less probative force than the corresponding primary evidence; that is why it is not received until such excuse as the law deems satisfactory has been given for the non-production of the primary evidence. When such excuse is forthcoming all kinds of secondary evidence are, as we have seen, equally admissible to prove the contents of a missing document (*l*): though they are far from being equally cogent. It is not to be supposed that oral evidence of a document, although in some cases equally admissible with an attested or examined copy, is therefore entitled to the same credibility; and it will be for a jury to place their own estimate on the value of the witness's memory. This, no doubt, is the reason why the Court is usually far more reluctant to admit secondary oral evidence than it is to admit secondary documentary evidence.

Take the eight cases, in which, as we have seen (*m*), secondary oral evidence is admissible. In all of these it is almost certain that there is no scope for falsehood. For instance, it is most improbable that a man when making a statement in the ordinary course of his duty, or against his interest, will tell a lie. In other cases, no doubt, *e.g.*, where evidence of reputation is admitted to prove general right, the sanction for the truthfulness of the evidence is distinctly weaker. But in these cases such evidence is necessary; a general right can scarcely ever be established without it. Such evidence, moreover, must have come into existence *ante litem motam*. And even when admitting such evidence the Court frequently warns the jury against giving it much credit (*n*). The safeguards for the admissibility of secondary documentary evidence are not so strict. In fact, the latest tendency is, for the convenience of parties and by their consent, to admit any secondary documentary evidence without strict proof of the loss or destruction of the original.

(*l*) See *ante*, p. 307.
(*m*) See *ante*, pp. 264, 265.
(*n*) *Per* ROMILLY, M.R., in *Crouch* v. *Hooper*, 16 Beav. 182; and see *Taylor* v. *Witham*, 3 Ch. D. 605.

Secondary evidence, then, of the contents of a document is admitted by our Courts more readily than secondary evidence of an oral statement. This is because a document cannot change and cannot be cross-examined; hence an accurate copy of a document is almost as valuable as the original. But a witness can always say more, and can often be made to say less, than is written down in any statement of his evidence. Cross-examination will often effect important variations or disclose weak points in his evidence. It is therefore unfair to the opponent that the witness should not be cross-examined in the hearing of the jury which has to decide the issue. But though as a rule secondary evidence is *ex hypothesi* of less value than primary, nevertheless there are circumstances in which it is at least equally cogent. Thus, a marriage is usually proved by a certified copy of the register, together with some evidence of identification of the parties. The copy is obviously *derived* from the register, and the register owes its existence to the rector or registrar. But if called as witnesses the rector or registrar would probably decline to pledge his memory to identification of a quite ordinary marriage of many years previously. He would at once appeal to the register, and be guided by what he found there. In this case, then, the register is as valuable as the registrar. But, further, it is undesirable on grounds of public policy for registers to be sent travelling up and down the country. Hence, as we have seen (*o*), by statute a certified copy of an entry in a register, if sealed with the seal of the Registrar-General's office, has rightly been made sufficient evidence of the birth, death, or marriage to which the entry relates.

We proceed now to deal with the means adopted by our law to secure, so far as possible, that the evidence laid before the Courts should be clear and reliable.

(*o*) See *ante*, p. 227.

CHAPTER II.

HOW TO TEST THE VERACITY OF A WITNESS.

THE State does all it can to secure that the evidence given by every witness in our Courts shall be true. It seeks to impress upon him that it is his interest, as well as his duty, to tell the truth, and that it is against his interest to tell a lie.

The mind of a witness is influenced in this direction by six considerations, which may be called the sanctions of truth.

First, the arrangements of our Courts are such that a witness, when giving evidence, is placed in a box by himself, away from papers and friends.

Secondly, from that conspicuous position he can see all his friends and enemies—the very people whose esteem he wishes to keep or gain, and whose ridicule or contempt he wishes to avoid, and he knows that if he is detected in a lie he will incur social infamy.

Thirdly, he is solemnly sworn to tell the truth. If he breaks his oath, he will be committing a most serious sin.

Fourthly, he will not be allowed to tell the story in the way in which he relates events in his every-day life. Every fact, every incident, every inference may be challenged in cross-examination, and he knows that once in the box he cannot escape

cross-examination, if the opposite party desires it. The only way in which he can be sure of coming out unscathed is to tell the truth clearly and simply.

Fifthly, he knows that if he is detected in lying, he may not only forfeit esteem and incur contempt, but may also be prosecuted and severely punished.

And lastly, he will find it easier to tell the truth than to invent a lie. It is not so difficult to relate what happened, as it is to tell a lie which is sufficiently plausible and circumstantiated to impose upon the Court. Even the most expert liar has to watch his words very carefully; for, if the truth slips out even in the least important detail, it may be sufficient to throw doubt on the whole story. It often happens that, in a moment of inadvertence, a witness admits the very fact which he has been trying to conceal. Most witnesses, moreover, wish to tell the truth, or, at least, not to tell deliberate falsehoods.

Hence witnesses usually speak the truth, and therefore juries instinctively confide in them until it is shown that they are unworthy of credence. Nevertheless, it often happens that the evidence given by a witness is misleading. Such cases may be classed under three heads:—

The witness may not wish to tell the truth. He may commit deliberate perjury, not as to the whole of the facts, but as to the facts which are crucial to the issue.

Again, though not wishing to commit perjury, he may be very unwilling to assist the other side. The fact that he is a relation of the person calling him,

or his employer, or employed by him, or that he has a spite to gratify or a pecuniary interest in the result, may lead him to suppress part of the truth, or pretend ignorance as to matters with which he is acquainted, or wilfully exaggerate or minimise the facts to which he is deposing, even where he would shrink from deliberately inventing a lie.

And lastly, the witness may be ready and willing to tell the truth, but unable to do so—he may be physically or mentally incapable of appreciating the true bearing of the questions asked him or the answers given by him, and that either because such is his normal constitution or because he finds himself in a position which he has never occupied before. His vocabulary may be limited, and may consist largely of local terms, having little or no meaning to the general public, and these he may be unable to explain or translate. Again, he may not attend to the questions asked him, so that, although competent to answer properly, he gives a wrong answer. Inaccuracies arise far oftener from such defects than from any other reason. Many witnesses have been thought to be committing perjury when, as a matter of fact, they were unable to speak the truth in consequence of mental or physical conditions.

It is not enough that a witness should have no motive or interest to mislead. He will not be a good witness unless he had the opportunity to observe, the power of observing accurately, and of discriminating between facts and inferences from facts. He must also have a good memory, and,

lastly, the ability to state clearly and accurately the facts which he does remember.

We will now deal in more detail with the causes which may render the evidence of witnesses unworthy of credence.

First we will deal with the man who comes into the witness box resolved, if necessary, to commit deliberate perjury. Happily this kind of witness is not so often seen in our law courts as many persons suppose. Most witnesses wish to speak the truth, or, at all events they shrink from conscious falsehood. But there are cases in which the judge or jury cannot escape from the conclusion that the witnesses on one side or the other are purposely misrepresenting the facts within their knowledge. Now in the first place a distinction is to be observed between a false assertion and a false denial. It is comparatively rare for a witness to invent something which never happened; but he is generally willing to deny what witnesses on the other side have already asserted, and it frequently happens that a man who has denied that an event ever occurred with apparent frankness and honesty will so hesitate in giving his own version, that it will be obvious to everyone in Court that he is constructing an untrue story. It must be remembered, however, that pretended ignorance and wilful exaggeration amount to perjury just as much as untrue assertion.

It does not follow because a man gives evidence badly that he is lying; nor will the fact that a man has a bad character—even that he has been convicted of a crime—necessarily preclude him from being relied upon as a witness of truth.

But far more frequently, the facts are perverted by what we will call the partisan witness, a man whose interest or motive may not be enough to cause him to tell a downright lie, but yet may so colour his evidence as to make it misleading. He is not prepared to go the length of committing flat perjury, but he is determined

to say as little as he can to help the other side. Often, unless he is skilled in giving evidence, his testimony does more harm to his own side than to his opponents; for in his desire to score points he can easily be led on under cross-examination to make statements which no one believes and which discredit his own evidence, and that of the other witnesses on the same side.

Sometimes a man makes a partisan witness because he has a pet aversion or is wedded to a theory. In that case, a skilful cross-examiner will lead him gently to expound his theory or to air his aversion. This may destroy the value of his evidence as to the particular matter in issue. Again, *esprit de corps* is often a powerful factor. In all these cases the tribunal must endeavour to discover (i.) the facts and reasons upon which the witness's opinion is based, and (ii.) the motives which render him a partisan.

There is special difficulty in dealing with the evidence of expert witnesses. Such evidence must always be received with caution; they are too often partisans—that is, they are reluctant to speak quite the whole truth, if the whole truth will tell against the party who has paid them to give evidence. At the same time such witnesses are in a position of advantage; for they have had that special training and special experience which the judge and jury are without, and the absence of which renders necessary the presence of such witnesses.

The Court must try to elicit the grounds for the opinion expressed, the experiments or other facts on which the opinion is based, and the authorities on which the witness relies. Experts, moreover, frequently have a favourite theory in which they believe, and consequently tend to apply whenever they can, even if it is not generally accepted as true, or has very little bearing on the point in dispute. Expert witnesses are far too prone to take upon themselves the duty of *deciding* the questions in issue in the action, instead of confining themselves to stating fairly and clearly their real opinion on the matter. Their duty is merely to assist the Court

by calling its attention to, and by explaining, matters the true significance of which would not be clear to persons who have received no scientific training, or have had no special experience in such matters (*a*).

In many cases, the clear evidence of non-experts who depose to the fact is more cogent than the evidence of experts, who merely form conjectures. Thus, where an attesting witness swore clearly and distinctly that the deed was executed in his presence by R. and his wife, both of whom he knew, this evidence was held not to be counterbalanced by the evidence of experts, who expressed an opinion that the signature purporting to be that of R. was not in the character of his handwriting (*b*).

Next, we must deal with the witness who honestly desires to tell the truth, but who misleads the Court by giving stupid, incomplete, or inaccurate evidence. In the vast majority of cases, this is due to surrounding circumstances, to his mental or physical characteristics, to nervousness and timidity, confusion of mind, or mere inattention to the question.

A good witness requires the following intellectual faculties:—

(i.) *Perception.*—The power of observing what he has the opportunity of observing.

(ii.) *Judgment.*—The power of discriminating between facts and inferences.

(iii.) A good *memory.*

(iv.) Power to *express* clearly and accurately what he does remember.

(i.) A witness must of course have had the chance to observe, but he may not have observed anything helpful to the Court. This may occur for many reasons. He may have been preoccupied, and so paid no attention to what was passing in his presence; he may have had no interest in the matter, and no motive for paying attention to it, or though he may have been present at one time he

(*a*) See *Hennessy* v. *Keating*, 25 R. P. C. 125; *Birmingham S. A. Co.* v. *Webb*, 24 R. P. C. 27.

(*b*) *Newton* v. *Ricketts*, 9 H. L. Cas. 262.

was absent when the important event happened. He may have been too old, blind, deaf, or suffering from want of intelligence. For these reasons the positive evidence of one witness who can say, "I was present and saw it," is stronger than that of a number of persons who were present and did not see.

Romilly, M.R., says in *Sharples* v. *Adams* (*c*) :—

"As a rule people observe best that which is important to themselves, or strikes them as unusual or odd. Certain events produce of necessity a more lasting impression than others, and allowance must be made for this fact. Women as a class are more observant than men, especially in matters where details of dress are involved."

On the other hand, the value of a witness's evidence may be impaired if he pledges himself to precise details of time, measure, distance, etc., without having any means of forming a precise judgment on such matters.

(ii.) Want of *judgment* must make a man a bad witness. We often meet with witnesses who draw hasty conclusions, or think in a slipshod way; while others are imbued with false opinions, hobbies, theories, or foregone conclusions, which create a false impression in their minds, and render their evidence flighty and inaccurate.

Many a person when giving evidence appears unable to discriminate in his mind between those things which he really saw or heard at the time, and those which he has since concluded that he must have seen or heard, though in fact he did not. He has talked the matter over with the other witnesses; he has, as they say, put two and two together. He infers from that which he is told happened subsequently that something else must have happened when he was present, and states the latter as though it had occurred within his own observation Such departures from the field of actual fact are often indicated by looseness of expression, and the use of such phrases as, "of course he did" so-and-so, or "he must have done it."

(iii.) A good memory is also essential to a good witness; but the tribunal has often to deal with marvellous

(*c*) 11 W. R. 456.

eccentricities of memory which do not necessarily imply a bad memory, or want of memory on essential points. Much depends upon the "vivacity" of the impression made at the time. Old people, too, remember more easily events of a distant date than those of more recent occurrence. Too accurate a memory may be suspicious, especially where it is wonderfully minute and accurate on unimportant details, and wonderfully inaccurate on things that no one could easily forget. But great care should be taken not to suspect such evidence unjustly; some men have a wonderful memory for trifles.

Lapse of memory may amount to "mere oblivion," where the witness's mind is apparently an entire blank on the matter. But more often false recollection may have superseded the truth, though it is seldom that the whole of the true picture is wiped out. Some portion of the original impression generally remains, and by skilfully working from that the whole picture may often be restored.

(iv.) Lastly, a man is not a good witness unless he is able to tell his story clearly and well, a faculty which is often lacking in the most veracious witness, who consequently either misleads the Court or meets with undeserved discredit. In every-day life we often meet persons who, with the best intentions in the world, seem to find it physically impossible to narrate an event or even to convey a message correctly. They lack either power of apprehension or power of expression, and these defects are aggravated when they have to give evidence publicly in a crowded Court. Many witnesses, too, have a limited vocabulary, and use the same word in many different senses. Others cannot refrain from employing local and technical terms which detract from the clearness of their evidence.

So far we have dealt with the mental condition and physical characteristics of a single witness, treating his evidence as though it stood alone.

But in nearly every case the Court has to decide between the conflicting evidence of apparently truthful witnesses. To decide between these witnesses and to determine which to believe, three tests of truth may be applied.

We must consider (i.) The demeanour of the witness in the box. A witness of truth usually gives prompt, frank answers to all questions whether they tell for or against his side. Even if an untruthful witness shows no signs of weakness in his examination-in-chief, under skilful cross-examination he will usually disclose his latent bias or motive. If he suddenly becomes deaf or dull when awkward questions are asked; if he shuffles or fences with the question, or answers it "by the card," then his evidence will be discredited. Nevertheless it must be remembered that demeanour is not conclusive; a truthful witness may create a bad impression while an untruthful one may appear to be frank and honest.

(ii.) The evidence given by the witness. It should be clear, direct, detailed, and given with care and reflection; not learned by heart, and not suggested beyond reasonable limits. The details given should be equally copious whether the witness knows they can be checked by the other side or not. If all these requirements are fulfilled, the evidence is probably true.

(iii.) The evidence must be consistent with the other materials before the Court. It must be compared and contrasted with the documents in the case, with the conduct of the witness after the events which he describes, with the evidence given

by other witnesses on the same or on the other side, and with all the surrounding circumstances of the case. The tribunal should also consider whether the witness is interested or independent, how the evidence was procured, and at what stage of the proceeding it was produced.

(i.) The demeanour of the witness. In estimating the probable veracity of a witness the jury should consider his intellectual capabilities, his moral character, his rank and position in society, and what possible motive he might or could have to colour or soften the truth. This can only be done by closely watching his demeanour in the witness-box (*d*).

From the way in which he gives evidence one can often discover whether the witness is a liar, is a partisan or has a bias, or whether he is a truthful witness struggling to tell an honest tale in spite of physical or mental disabilities, and of his unusual surroundings. If he is over-forward and over-zealous in giving answers in favour of one side, but reluctant to make any admissions that would go against that side; if his memory is clear and precise on all points that tell in favour of one party, but hazy and obscure when the truth would benefit the other party, then we may safely conclude that he is a liar or a partisan.

As his evidence proceeds it will often become apparent why he is a partisan. He will show malice against one party, friendship for the other; and it may appear that he is wedded to a theory or actuated by some pet aversion. He must have some motive for telling only half the truth, and this will probably be elicited in cross-examination.

The jury should also notice whether the evidence has

(*d*) It is one good result of the provision contained in the Criminal Appeal Act, 1907 (7 Edw. VII. c. 23), s. 16, which requires the presence of a shorthand writer at the trial of every indictment, that the judge is now relieved from the labour of taking a complete note of the evidence, and so can observe the demeanour of the witness, and also of the prisoner, as the trial proceeds.

been "coached up." Has it been rehearsed? There is no harm in its being premeditated, but it should not be learned by heart. Young children are sometimes taught to repeat a certain story by rote, and then it will often be found that they are using expressions which they cannot explain, such as "the prosecutor" or "the 20th inst." It is often desirable to ask a witness, whether an infant or an adult, to repeat some material portion of his evidence; if he repeats it in precisely the same language, he has probably learnt it by heart; for otherwise it would be natural for him to change a phrase here or there. No blame attaches to a witness if, before the trial, he tells his friends what he proposes to say in the box: it would be strange if he did not. But it is wrong for him to allow anyone to induce him to say more than he really does recollect. The transition from his own uninspired narrative to the matter supplied by a third person may often be detected by a change in the witness's voice or manner, by a certain hesitancy, or by an apologetic demeanour.

(ii.) After the witness has left the box, much may be learnt from the evidence itself. Is it definite and complete, or does it mysteriously stop short without any apparent reason? Is it hazy as to all details where detailed evidence might reasonably have been anticipated? Are details given on some points but not on others which the witness had equal opportunity of observing? Are details given which apparently he could have had no opportunity himself of observing, and, therefore, must have learnt from others whose assistance he does not acknowledge? Is his memory suspiciously vague or suspiciously accurate? for in some cases too good a memory may be suspicious. Nevertheless, the story told should be circumstantial, that is, all the surrounding circumstances should be narrated as well as the main fact.

A witness who will give details on points which must be within the knowledge of the other side is usually to be believed. Witnesses of truth are always equally ready

and equally copious upon all points that have come within their knowledge.

Lastly, is the witness's story credible? The mere fact that it is inherently improbable is not decisive of its untruth, for "truth is stranger than fiction." The jury are placed in the box as men of business and of common sense; and it is their duty to apply to the evidence given before them the experience that they have gained in the affairs of common life.

(iii.) The evidence of each witness must be compared with his own letters and all other documents in the case. Those which came into existence before the dispute arose are especially valuable for this purpose, though the party sometimes changes his ground during the progress of the action. A witness's own letters often afford valuable material for his cross-examination. If in the box he contradicts any statement to the truth of which he has sworn in an affidavit, the jury will probably believe neither his present tale nor the affidavit.

Next, if the events which the witness has described really occurred, his subsequent conduct must be consistent with them (*e*). If it is not, the jury will doubt his story. Circumstances may often tell against a man, and then it is most material to inquire, "Did he act as an honest man would have acted in like circumstances? Or has he taken steps to avert suspicion from himself?" In criminal cases it is often material to inquire into the subsequent conduct of the prosecutor or prosecutrix as well as that of the prisoner. This is especially true in charges of rape. As Lord Hale said:—

"The party ravished may give evidence on oath, and is in law a competent witness; but the credibility of the testimony, and how far she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact that occur in her testimony. For instance, if the witness be of good fame, if she presently discovered the offence, made pursuit after the offender, showed circumstances and signs of the injury . . . if the place wherein the fact was done was remote from people, inhabitants, or passengers, if the offender fled for it; these and the like are concurring evidence to

(*e*) See *In re Barr's Trusts*, 4 K. & J. 236.

give greater probability to her testimony when proved by others as well as herself. But on the other hand, if she concealed the injury for any considerable time after she had opportunity to complain, if the place where the fact was supposed to be committed were near to inhabitants, or common recourse, or passage of passengers, and she made no outcry when the fact was supposed to be done, when and where it was probable she might be heard by others; these and the like circumstances carry a strong presumption that her testimony is false or feigned" (*f*).

Again, if a witness, especially an expert, offers his services to one side and then gives evidence in favour of the other party, his statements should be regarded with suspicion.

Thirdly, it is material to inquire whether the witness is dependent on or connected with the party in whose favour he testifies. Is he a near relation or intimate friend? Is he a servant, employee, or tenant of either party? Has he anything to gain or lose by the result of the litigation? One wholly independent witness may often be more reliable than several who are not independent.

Then, the evidence of each witness must be compared with that given by other witnesses called on the same side. It is not to be expected that they should all agree in every particular. A certain amount of discrepancy as to minor details will not destroy the value of their evidence. And, for this reason, details immaterial to the issue may acquire accidental significance if the witnesses differ as to them. Indeed, a concurrence in minute details will arouse a suspicion that their story has been concocted. But the witnesses called on the same side ought to agree on all material points which they had an equal opportunity of observing. If there is any ground for suspecting that the witnesses have joined in inventing a tale, they should be required to leave the court, and come in singly to give their evidence. Otherwise anyone who has heard the cross-examination of a previous witness will be able to fill up any gaps in that evidence, to swear clearly on any point as to which the former

(*f*) Hale, Pleas of the Crown, I. 633.

witness was doubtful, and to invent a fresh tale to make everything consistent. In some cases a plaintiff has been driven to put the defendant in the box. This is very dangerous tactics, for by calling the defendant as his witness, the plaintiff is thus disabled from impeaching his credit (*g*). In one case (*h*) where this had been done, and the defendant had contradicted the evidence of the plaintiff's other witnesses on a vital point, HAMILTON, J., held that, where two equally credible witnesses called by one side contradict each other, it is not competent for the party calling them to seek to discredit one and accredit the other.

Where a number of reliable witnesses agree upon all points material to the case it is extremely difficult to shake their evidence.

Fifthly, the evidence on one side must be contrasted with the evidence given by the witnesses on the other side. The tribunal must weigh the evidence, not count the witnesses on each side. One honest witness on one side may outweigh a host of unreliable witnesses on the other. It is to be expected that the story told by the plaintiff's witnesses will differ in many respects from the version put forward by the defendant's witnesses. But it is most material to observe on what matters they agree. If a fact alleged by one side be admitted by the other, the jury may rely upon this as absolute truth, and may draw from it inferences of fact which may guide them through a maze of conflicting evidence on other points.

As Lord WENSLEYDALE said, in an Indian case before the Privy Council :—

"There is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence, where perjury and fraud must exist on the one side or the other, than to consider what facts

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(*g*) *Scott* v. *Sampson*, 8 Q. B. D. at p. 498. This was an action of libel, in which the defendant had pleaded justification; he called the plaintiff as his witness, and the result was a verdict against the defendant for £1,500.

(*h*) *Summer* v. *Brown*, 25 T. L. R. 745

are beyond dispute, and to examine which of the two cases best accords with those facts, according to the ordinary course of human affairs and the usual habits of life" (*i*).

Again, in estimating the value of a particular piece of evidence it is often important to ascertain by what method that piece of evidence was procured, and at what stage of the proceedings it is first forthcoming.

Evidence is often given in the Divorce Court by "private detectives" who have been paid to watch one of the parties. Their evidence must be received with caution, and so must evidence of an admission obtained by one who was sent to procure it (*j*). The fact that a document is not produced from a proper custody will impair its value, especially if there is ground for supposing that it has been obtained surreptitiously or by dishonest means. So, the fact that a piece of evidence is only forthcoming at the last moment, and that a document produced at the trial is not included in an affidavit of documents, are matters which, if unexplained, may lead the jury to disregard them. Courts of justice look with the utmost suspicion on the conduct of parties, who intentionally keep secret matters at a time when they might be explained, and divulge them when lapse of years may have made contradiction or explanation impossible (*k*).

Lastly, it will always diminish the value of a witness's evidence, if he could easily have been corroborated on a vital point and such corroborative evidence is not produced. It is not necessary, as we shall see in the next chapter, that all available corroboration should in every case be produced. If thirty persons heard a slander uttered, it is neither necessary nor expedient to call more than two or three of them. But if no one except the plaintiff and a disinterested stranger heard the slander,

(*i*) *Mir Asadulah* v. *Bibi Imaman*, 5 Cal. W. R. P. C. 26.

(*j*) As to answers to questions put to a suspected person by a police officer or other person in authority, see *R.* v. *Knight*, 20 Cox, 711; *R.* v. *Best*, [1909] 1 K. B. 692, and other cases cited, *ante*, pp. 103, 104.

(*k*) Cf. *Campbell* v. *Campbell*, L. R. 1 H. L. Sc. 182.

and the plaintiff does not call that stranger, the jury will be apt to believe the defendant's denial of the utterance. In the famous Rugeley murder case, where the prosecution alleged that Palmer had caused the death of Cook by administering to him minute doses of strychnine, and it was proved that Palmer had purchased strychnine, Palmer's defence was that he had given the strychnine so purchased to his groom and bidden him to administer it to his horse in order to make his coat sleek, but Palmer, although calling other witnesses in his defence, did not call the groom. This fact was strongly urged upon the jury by Sir Alexander Cockburn in his reply, and had no doubt a large share in inducing the jury to find a verdict of Guilty (*l*).

(*l*) *Palmer's Case*, Stephen, Hist. Cr. L., III. 389.

CHAPTER III.

CORROBORATION.

As we have already seen, it will greatly impair the value of a witness's evidence that it might easily have been corroborated and is not. This remark applies as a matter of expediency to all witness actions, but there are certain cases in which the Legislature has required as a matter of law that credence should not be given to the unsupported testimony of one witness, and there are other cases in which the practice of the Court is for a judge sitting alone not to act, or, if assisted by a jury, to advise them not to act, upon the evidence of a single witness unless it is corroborated in some material particular.

The cases in which corroboration is positively required by law must always be carefully distinguished from those in which corroboration is merely desirable as to the testimony already given. The former cases are nine in number (*a*) :—

(i.) Breach of promise of marriage.
(ii.) Treason.
(iii.) Perjury.
(iv.) Personation at elections.
(v.) Bastardy.

(*a*) Corroboration was also required by two ancient statutes (1 Eliz. c. 1; 9 Will. III. c. 35) relating to blasphemy. They are still unrepealed, but are omitted here, as no prosecution ever takes place under them.

(vi.) Offences against women and girls under ss. 2 and 3 of the Criminal Law Amendment Act, 1885.

(vii.) Offences under the Motor Car Act, 1903, s. 9 (1).

(viii.) Criminal cases, in which the unsworn evidence of a child has been admitted.

(ix.) Proceedings for the removal of paupers.

And in three cases, also, though corroboration is not required by law, the Court usually advises the jury not to act upon the evidence of a single witness unless it is corroborated, and will itself adopt this course. One is where the only evidence on a criminal charge is that of an accomplice; another is where the charge is one of rape or of a kindred offence; and the third is where a claim is made to property forming part of the estate of a deceased person. In such cases, however, the rule is only a rule of prudence, and if the tribunal when properly directed chooses to act upon such evidence, its decision cannot be upset.

1. The action for breach of promise of marriage is the only civil action in which corroboration is expressly required by statute (*b*). This action has been singled out, no doubt, for the reason that there is no other kind of action which can be so easily brought and against which it is so difficult to defend oneself. The Law of Evidence Act, 1869 (*b*), which for the first time renders the parties to such an action competent witnesses, enacts:—

"That no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise."

(*b*) 32 & 33 Vict. c. 68, s. 2.

The statute applies to all actions brought in England, even if the promise has been made abroad according to the law of a country which may require more or less evidence than the English law does (*c*).

The corroborative evidence must be in support of the alleged promise, and it will not be sufficient to corroborate the testimony of the plaintiff on other points; but the evidence need not be such as would alone establish the promise if it supports it (*d*). The corroborative evidence must not be that of the plaintiff (*e*). It has been held, that the evidence may relate to matters anterior to the date of the alleged promise (*f*). The letters of the defendant may afford the necessary corroboration. And so may the defendant's conduct, if described by witnesses other than the plaintiff. The fact of the defendant in the action not answering letters written by the plaintiff, in which she stated he had promised to marry her, is not such evidence (*g*) unless there is some clear reason to expect that he should do so (*h*). But the fact of the defendant not answering when charged orally by the plaintiff with having promised to marry her is corroborative evidence (*i*).

2. On charges of high treason (unless the accused is being tried for actually killing or attempting to kill the Sovereign (*k*)), or misprision of treason, no person can be convicted except upon the oaths and testimony of two lawful witnesses, either both to the same overt act of treason, or one to one act, and the other to another act of the same treason, unless the accused willingly and without violence in open Court confesses the same. If two or more distinct treasons of different kinds are alleged in one indictment, one witness who is produced

(*c*) *Hansen* v. *Dixon*, 96 L. T. 32.
(*d*) *Bessela* v. *Stern*, 2 C. P. D. 265.
(*e*) *Owen* v. *Moberley*, 64 J. P. 88.
(*f*) *Wilcox* v. *Gotfrey*, 26 L. T. 328, 481.
(*g*) *Wiedemann* v. *Walpole*, [1891] 2 Q. B. 534 ; see *ante*, pp. 85, 86.
(*h*) *Spooner* v. *Godfrey*, Times newspaper, October 16th, 1908.
(*i*) *Bessela* v. *Stern*, *supra*.
(*k*) 39 & 40 Geo. III. c. 93 ; 5 & 6 Vict. c. 51, s. 1 ; 11 Vict. c. 12.

to prove one of these treasons and another witness produced to prove another of them are not two witnesses to the same treason (*l*). It is not necessary to call two witnesses to prove a fact which is merely collateral, *e.g.*, the nationality of the prisoner (*m*), and if one overt act be charged, which is made up of several circumstances, it will be enough if the joint testimony of two or more witnesses establishes the act as a whole (*n*). The rule does not apply to charges of treason felony (*o*).

3. Again, in prosecutions for perjury, although the administration of the oath, the competency of the Court and every other issue in the proceeding may be established by the evidence of a single witness, the issue as to whether the defendant's statement was true or false cannot be proved by the evidence of one witness (*p*); otherwise it would be a case merely of one man's oath against another's (*q*). But it is not always necessary to call two witnesses; the evidence of one witness will be sufficient if he be corroborated in some material particular.

Such corroboration may consist of a verbal or written admission made by the defendant contradicting his own evidence. Thus, a letter written by the defendant either before or after he is alleged to have committed perjury may be sufficient corroboration of a single witness, who has sworn to the falsity of the defendant's statement (*r*). But where the only evidence tendered of the falsity of the perjury alleged in the indictment was that on another occasion the defendant had sworn the exact opposite, Gurney, B., held that, as there was nothing before him to show which of these contradictory statements was true and which was false, the defendant must be acquitted (*s*).

4. Personation. A person charged with personation

(*l*) 7 Will. III. c. 3, ss. 2, 4.
(*m*) *R.* v. *Vaughan*, 13 How. St. Tr. 485.
(*n*) *R.* v. *McCafferty*, 10 Cox, 603.
(*o*) 11 Vict. c. 12.
(*p*) 1 & 2 Geo. V. c. 6, s. 13; *R.* v. *Threlfall*, 111 L. T. 168.
(*q*) *R.* v. *Yates*, Car. & M. 132; *R.* v. *Muscot*, 10 Mod. 192.
(*r*) *R.* v. *Hook*, 27 L. J. M. C. 222; *R.* v. *Hare*, 13 Cox, 174; *R.* v. *Mayhew*, 6 C. & P. 315.
(*s*) *R.* v. *Wheatland*, 8 C. & P. 238.

at any parliamentary or municipal election cannot be committed for trial, unless at least two witnesses give evidence that he has knowingly personated and voted in the name of another (*t*).

5. Bastardy. An affiliation order on a putative father, under 35 & 36 Vict. c. 65, cannot be made unless the evidence of the mother is corroborated by other evidence in some material particular. Evidence of acts of familiarity between the mother and the defendant, although before the time when the child would have been begotten, are corroborative evidence within the meaning of the statute, although, of course, the weight to be attached thereto is a matter for the Court (*u*). That there was opportunity will not be enough, unless it was of such a nature as to provoke suspicion (*x*).

6. By the Criminal Law Amendment Act, 1885 (*y*), a person accused of the crimes created by ss. 2 and 3 of the Act, cannot be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused.

7. By s. 9 (1) of the Motor Car Act, 1903 (*z*), it is laid down with reference to the speed of motor vehicles on public highways that—

"... a person shall not be convicted under this provision for exceeding the limit of speed of twenty miles merely on the opinion of one witness as to the rate of speed."

8. Section 30 of the Children Act, 1908 (*a*), as amended by the Criminal Justice Administration Act, 1914 (*b*), enacts that in any criminal case, in which the unsworn evidence of a child has been admitted either for the

(*t*) 6 & 7 Vict. c. 18, s. 88; 35 & 36 Vict. c. 33, s. 24. Apparently the same number of witnesses will be necessary at the trial.

(*u*) *Cole* v. *Manning*, 2 Q. B. D. 611; *Thomas* v. *Jones*, [1921] 1 K. B. 22.

(*x*) *Dawson* v. *M'Kenzie*, [1908] S. C. 648; and see *Reffell* v. *Morton*, 70 J. P. 347; *Burbury* v. *Jackson*, [1917] 1 K. B. 16.

(*y*) 48 & 49 Vict. c. 69. See also s. 4, part of which was repealed by the Children Act, 1908, *infra*.

(*z*) 3 Edw. VII. c. 36; but see *Plancq* v. *Marks*, 94 L. T. 577.

(*a*) 8 Edw. VII. c. 67; and see *R.* v. *Davies*, 114 L. T. 80.

(*b*) 4 & 5 Geo. V. c. 58, s. 28 (2).

prosecution or for the defence, some other material evidence, implicating the accused, must be given in corroboration.

9. In proceedings for the removal of paupers, no order for removal may be made upon the evidence of the pauper, who is to be removed, without corroboration sufficient to satisfy the Court (*c*).

Next come the three classes of proceedings, in which the rule is not a rule of law, but is one of mere expediency.

The first class is where the prosecution relies upon the evidence of an accomplice. Such evidence must always be received with suspicion; for the witness is seldom actuated by the simple desire to tell the truth. He may be swearing falsely in the hope of escaping punishment himself, or in order to convict a former friend with whom he has now quarrelled. Accordingly, it is the universal practice for the judge to direct the jury not to convict upon the evidence of an accomplice, unless it is corroborated in some material particular by other evidence which is not so tainted (*d*). "This rule of practice has become virtually equivalent to a rule of law" (*e*). Indeed, it is now the practice of the Court of Criminal Appeal to require corroboration of the evidence of an accomplice, even where it is not required by statute (*f*).

An accomplice is a person who has consciously assisted in the commission of the crime in question. Thus the thief, who is called to give evidence against another on the charge of receiving, is an accomplice (*g*). The judge must be satisfied that the witness was in fact an accomplice. It has been held that a police spy, or even an *agent-provocateur*, is not an accomplice (*h*). The

(*c*) 39 & 40 Vict c. 61, s. 34.

(*d*) *R.* v. *Tate*, [1908] 2 K. B. 680; *R.* v. *Everest*, 73 J. P. 269; *R.* v. *Noakes*, 5 C. & P. 326.

(*e*) *Per* Lord Reading, C.J., in *R.* v. *Baskerville*, [1916] 2 K. B. at p. 663.

(*f*) *R.* v. *Cohen*, 111 L. T. 77; *R.* v. *Norris*, 116 L. T. 160.

(*g*) *R.* v. *Patram*, 2 East, P. C. 782; *R.* v. *Robinson*, 4 F. & F. 43; *R.* v. *Pratt*, *ibid.*, 315.

(*h*) *R.* v. *Mullins*, 3 Cox, 526; *R.* v. *Bickley*, 73 J. P. 239.

mere fact that the thief has asked a woman to pawn a stolen watch for him does not make her an accomplice (*i*). The wife of an accomplice need not be corroborated, where she is herself innocent of any connection with the crime (*k*).

The corroboration must be such that it should satisfy the jury that the prisoner is the person who committed the offence with which he is charged (*l*); and it must be evidence which is admissible against him. Thus, if several persons are charged together and the evidence of an accomplice is only corroborated as to some of them, the others ought to be acquitted (*m*). So, too, the mere fact that the prisoner made no answer when formally charged (*n*), or when a statement written by another person also accused of the crime is read to him (*o*), is no corroboration of the story of the accomplice.

The jury, however, is entitled, if it thinks fit, to disregard the caution of the judge and to find the prisoner guilty in the absence of such corroboration (*p*). As Lord ELLENBOROUGH said in *R.* v. *Jones* (*q*):—

> "No one can seriously doubt that a conviction is strictly legal, though it proceed upon the evidence of an accomplice only. Judges, in their discretion, will advise a jury not to believe an accomplice, unless he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts to which he deposes."

Where, however, the point has been taken on behalf of the accused, and the judge omits to warn the jury, the Court of Criminal Appeal will in general quash the conviction (*r*).

Where two or more persons are jointly charged with

(*i*) *R.* v. *Kirkham*, 73 J. P. 406.
(*k*) *R.* v. *Willis*, [1916] 1 K. B. 933.
(*l*) *R.* v. *Foster*, 8 C. & P. 107.
(*m*) *R.* v. *Stubbs*, Dears. 555.
(*n*) *R.* v. *Tate*, [1908] 2 K. B. 680; but see *R.* v. *Feigenbaum*, [1919] 1 K. B. 431.
(*o*) *R.* v. *Pearson*, 72 J. P. 449; *R.* v. *Dibble*, 72 J. P. 498.
(*p*) *R.* v. *Stubbs*, Dears. 555; *R.* v. *Attwood*, 1 Leach, 464; *In re Meunier*, [1894] 2 Q. B. 415.
(*q*) 2 Camp. at p. 133.
(*r*) *R.* v. *Tate*, *supra*; *R.* v. *Beauchamp*, 73 J. P. 223; but see *R.* v. *Kirkham*, *supra*.

the commission of a crime, a statement made by one of them behind the back of the others, or even in the presence of the others when they are before the magistrate, is not evidence either for or against them. The Criminal Evidence Act, 1898, made a person charged with an offence a competent witness for the defence, whether charged solely or jointly with any other person. Hence, if two persons are jointly charged and one of them elects to give evidence and his evidence inculpates the other, it is evidence against that other, who therefore has an unrestricted right to cross-examine him (*s*). If the evidence which he gives exculpates the other, it is evidence for him (*t*). Where several persons are indicted, the prosecutor may, by leave of the Court, take a verdict of acquittal as to one or more, and call them as witnesses against the remaining prisoners (*u*). It appears also that an accomplice, who is himself charged on a separate indictment, is a competent witness for a prisoner (*x*); and a prisoner, who has pleaded guilty, may be called for or against his fellow prisoners (*y*). So, where the evidence against one of several prisoners is slight, the judge may direct an acquittal in order to enable the others to call him as a witness; and it seems that this may be done without taking a verdict against the prisoner who is so called (*z*); though it would, as a general rule, be judicious, where the accomplice is indicted with the prisoner, to dispose of the charge against him by acquitting or convicting the accomplice before he is called as a witness, so that the temptation to strain the truth should be as slight as possible (*a*).

Again, in practice the Court requires corroboration of the evidence of the prosecutrix in cases of rape and kindred sexual offences. As Sir Matthew Hale, C.J.,

(*s*) *R.* v. *Hadwen*, [1902] 1 K. B. 882.
(*t*) *R.* v. *McDonell*, 73 J. P. 490.
(*u*) *R.* v. *Owen*, 9 C. & P. 83.
(*x*) 2 Hale, P. C. 280.
(*y*) *R.* v. *George*, Car. & M. 111; *R.* v. *Hincks*, 1 Den. 84.
(*z*) *Windsor* v. *R.*, 7 B. & S. 360.
(*a*) See *R.* v. *Payne*, L. R. 1 C. C. R. at p. 354.

said of a charge of rape, "It is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent" (*b*); and this no doubt is why corroboration in some material particular is needed to support the evidence of the prosecutrix. "Apart from any technical rule upon the subject, it would be a most dangerous thing for any Court to allow an accusation of this sort to prevail, where there is no corroboration; and probably no Court would be induced to do so" (*c*). Such corroboration may be found in the appearance of the prosecutrix, the state of her clothes, statements made shortly after the occurrence, the result of an examination of her by a medical man, or, indeed, in the conduct of the accused himself. And in all criminal charges of a sexual offence, it is always unsafe for the jury to convict when there is only the word of the prosecutrix against that of the prisoner.

Lastly, the Court is very reluctant to admit the validity of a claim against the estate of a deceased person, whether it be a claim to specific property or to a debt due from him, on the uncorroborated evidence of the claimant himself. Indeed, in some cases, the judges have stated that there is a rule of law that such claims must be corroborated (*d*); but it is clear that the rule is only one of prudence. The evidence must, of course, be examined with care, and even with suspicion, but if the Court is convinced by it that the claim is good, full effect must be given to it (*e*). The judge in directing the jury should warn them not to accept such evidence unless they are convinced, but if after a proper direction the jury do act upon it, their verdict will not be disturbed on this ground (*f*). In one case, a release to a trustee was set

(*b*) 1 Hale, 635.

(*c*) *Per* Lord HALSBURY, L.C., in *Moore* v. *Bishop of Oxford*, [1904] A. C. at p. 284.

(*d*) See *In re Finch*, 23 Ch. D. 267; *Vavasseur* v. *Vavasseur*, 25 T. L. R. 250.

(*e*) *Rawlinson* v. *Scholes*, 79 L. T. 350; *In re Garnett*, 31 Ch. D. 1; *In re Hodgson*, 31 Ch. D. 177; *In re Griffin*, 79 L. T. 442.

(*f*) See *In re Finch*, 23 Ch. D. p. 271.

aside after his death upon the evidence of the plaintiff which was only confirmed by the tenor of the release itself (*g*). A *donatio mortis causâ* has also been established by such evidence, where the claimant, however, was not cross-examined (*h*).

In all other cases, corroboration is not required by law or necessarily insisted upon by the Court. Nevertheless the absence of corroboration which should be forthcoming is always a matter of comment, and may cause the tribunal to decide a case against the person who failed to produce such evidence.

Thus, on the trial of a petition for divorce, corroboration is usually expected by the Court (*i*). For example, if only one witness is called for the petitioner, especially if the witness is a woman of bad character, or if the only evidence is an uncorroborated confession, it is almost certain that the Court would not grant a decree (*k*). Again, on a summons for desertion, the Court ought not to act upon the uncorroborated evidence of one spouse, alleging marital intercourse at a material date, where the allegation is denied by the other spouse (*l*). So, too, no solicitor could hope to establish a verbal retainer without corroborative evidence, if the retainer is denied by the alleged client (*m*). Again, if a person be charged with attempting to procure abortion, the jury should be warned to hesitate to convict on the uncorroborated evidence of the woman upon whom the operation was alleged to have been performed (*n*).

(*g*) *In re Garnett*, *supra*.
(*h*) *Farman* v. *Smith*, 58 L. T. 12; and see *In re Weston*, [1902] 1 Ch. 680.
(*i*) See *ante*, p. 375.
(*k*) *Ginger* v. *Ginger*, L. R. 1 P. & D 37; *Curtis* v. *Curtis*, 21 T. L. R. 676; *Judd* v. *Judd*, [1907] P. 241; *Getty* v. *Getty*, *ibid.*, 334; *Riches* v. *Riches*, 35 T. L. R. 141.
(*l*) *Joseph* v. *Joseph*, [1915] P. 122.
(*m*) *Bird* v. *Harris*, 29 W. R. 45.
(*n*) *R.* v. *Cramp*, 14 Cox, 390; 5 Q. B. D. 307; *R.* v. *Bickley*, 73 J. P. 239.

CHAPTER IV.

EXAMINATION OF WITNESSES.

Long forensic experience has evolved a body of rules of practice which undoubtedly tend to elicit the truth, and thus materially assist the tribunal in ascertaining the weight which should be attached to the evidence of any witness.

In the first place, there is a precaution which either party may take, if he thinks fit, before any witness enters the box, or, indeed, before the case is opened to the jury. Whenever there is any dispute as to the facts, he may apply to the judge to order all the witnesses who are awaiting examination to leave the court; and this he may do whether he has any reason to suspect collusion between his opponent's witnesses or not. Such an order, although it is apparently not absolutely a matter of right, is never refused to the applicant (*a*). The order does not usually extend to a witness who is also a party, nor to a solicitor in the action, nor to scientific witnesses. If a witness remains in court after such an order, it seems that he may be attached; but his evidence will be received although subject to strong observation (*b*). Witnesses are only excluded while evidence is being given *vivâ voce*, and

(*a*) *Southey* v. *Nash*, 7 C. & P. 632; *R.* v. *Murphy*, 8 C. & P. 307.
(*b*) *Chandler* v. *Horne*, 2 M. & Rob. 423.

not while affidavits are being read (*c*). And any witness who has given his evidence must stay in court, and not rejoin the other witnesses who are still outside the court waiting to give evidence.

In the next place, when a witness is placed in the witness box, he must take an oath or make a solemn affirmation that he will tell the truth, the whole truth, and nothing but the truth. This is what Bentham calls the religious sanction of truth. The method of administering the oath or affirmation is now regulated by the Oaths Act, 1909 (*d*). As soon as the witness has taken the oath or affirmed, he will be examined by the counsel for the party who called him as a witness; this is termed examination-in-chief. Next, he will probably be cross-examined by the other party. Lastly, he may be re-examined by the party who called him. Certain rules have been established for the conduct of these examinations, and it is the purpose of this Chapter to state and explain them.

I. EXAMINATION-IN-CHIEF.

(i.) The first rule which regulates examination-in-chief is this:—Counsel can ask a witness whom he has called himself such questions only as are strictly relevant to the issue. Anything that goes to prove a material fact or which will affect the amount of damages recoverable is relevant; everything else will be rigorously excluded. And relevant facts must be proved in the legitimate way; a fact may

(*c*) *Penniman* v. *Hill*, 24 W. R. 245.
(*d*) 9 Edw. VII. c. 39; and see *ante*, pp. 188-190.

be most material, still that is no reason for admitting hearsay evidence in proof of it.

Again, counsel must confine his questions to matters of fact; he must not put to a witness points of law, or ask him what he inferred from the facts which he saw or heard. The personal opinion of the witness on any matter is, as a rule (*e*), inadmissible except in the case of skilled or scientific witnesses, who are allowed to state their opinions whenever special training or special experience is necessary to enable the tribunal to form a competent judgment on any matter in issue.

It is the duty of counsel to bring out clearly and in proper chronological order every relevant fact in support of his client's case to which the witness can depose. This task is more difficult than may at first sight appear. The timid witness must be encouraged; the talkative witness repressed; the witness who is too strong a partisan must be kept in check. And yet counsel must not suggest to the witness what he is to say. An honest witness, however, should be left to tell his tale in his own way with as little interruption from counsel as possible.

In criminal cases, the duty of counsel for the prosecution is wider. It is the practice, and probably the duty, of a prosecuting counsel to ask a witness questions favourable to the prisoner; for he must lay all the material evidence before the Court, whether it tells in favour of the prisoner or not, and not unduly press for a conviction.

If counsel, when examining a witness in chief, either seeks to prove an irrelevant fact or to prove a relevant fact by some improper means, counsel on the other side

(*e*) See *ante*, p. 37.

will at once rise and object. Such objections are frequently taken either to questions put by counsel or to something which the witness is endeavouring to say. An objection as to the admissibility of any evidence must be taken as soon as it is tendered; no objection can be raised after the evidence has been once received.

(ii.) The second rule is of equal importance, and conduces largely to prevent loose and inaccurate, as well as untrue, statements being made in court. It is this: counsel when examining-in-chief must not ask leading questions. It may be assumed that a witness is generally favourable to the cause of the party who calls him, and therefore may be inclined to overstate the circumstances which conduce to establish the case of that party; hence this rule.

A leading question is one which suggests to the witness the answer which it is desired he should give. The counsel who has called a witness will not be allowed to frame his questions in such a manner that the witness, by answering merely "Yes" or "No," will give the evidence which that counsel wishes to elicit (*f*). He must not put into the witness's mouth the words which he hopes the witness will utter; nor in any other way suggest to him the answer which it is desired he should give. Counsel must leave the witness to tell his own unvarnished tale.

The rule that leading questions must not be asked on an examination-in-chief is not inflexible.

In the first place, a question is not objectionable as leading when it is only introductory to what is material, or relates to matters as to which there is no dispute. In most cases it is necessary to prove a certain number of uncontested facts, in order that judge and jury may understand

(*f*) *Nicholls* v. *Dowding*, 1 Stark. 81; Cockle, 265.

the position of the parties and the circumstances surrounding the case. As to these matters, leading questions are often put with the permission of counsel on the other side, and such questions should then be put in the shortest and most direct manner. But when the real issue is approached, the witness must be asked such questions merely as, "What did you see?" "What did you hear?" "What happened next?" This rule prevents, at least in some measure, the possibility of any collusion between a prosecutor, or a party, and his witness.

Leading questions may also be put to contradict evidence already given by a witness on the other side; *e.g.*, if the plaintiff has sworn that the defendant said, "The goods need not all be equal to sample," the defendant can, and should, be asked, "Did you ever say to the plaintiff that the goods need not all be equal to sample, or any words to that effect?" And there are other occasions on which leading questions may be put by permission of the presiding judge, who has a general discretion over the conduct of all *viva voce* examination. For instance, when a question from its nature cannot be put except in a leading form, the judge may allow it to be put. Where a witness has manifestly or apparently forgotten a circumstance, and all indirect attempts to recall it to his mind have failed, the circumstances may be put to him in a leading form, and he may be asked whether he remembers it. Thus, where a witness stated that he could not remember the names of certain persons, but that he should remember and be able to identify them if they were read to him, Lord ELLENBOROUGH allowed this to be done (*g*).

(iii.) As a general rule a party has no right to discredit his own witness, or to call any evidence to contradict him (*h*), for he has voluntarily placed

(*g*) *Acerro* v. *Petroni*, 1 Stark. 100.

(*h*) Unless he was compelled by law to call that particular witness, *e.g.*, an attesting witness to a will.

the witness before the Court as worthy of belief. But it sometimes happens that a witness proves unexpectedly adverse to the party who calls him, and then this rule and the preceding one are relaxed, and counsel who called him may be permitted by the judge to attack the character and dispute the veracity of the witness—in fact, to cross-examine him. The foundation of the rule against leading questions is that the witness is favourable to the party who calls him; and when this is not the case, the reason for insisting on the rule is gone.

The mere fact that a party is driven to call his opponent as his witness does not entitle him to treat that opponent as hostile and cross-examine him without the leave of the Court (*i*). But whenever the judge is satisfied that a witness is hostile to the party who called him, he will, upon application, declare him so to be; and this will entitle the counsel for that party to treat him as a witness called by the other side (*k*).

The law on the matter is regulated by the Criminal Procedure Act, 1865 (*l*), which applies to all Courts both civil and criminal.

Sect. 3 enacts that:—

"A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

(*i*) *Scott* v. *Sampson*, 8 Q. B. D. 491; *Price* v. *Manning*, 42 Ch. D. 372.

(*k*) *Price* v. *Manning*, *supra*.

(*l*) 28 Vict. c. 18.

It is not enough that the evidence given by the witness is unfavourable to the party who called him; his manner and tone must show hostility to that party (*m*). The two statements need not be directly contradictory (*n*).

(iv.) A witness should always state what happened according to his own personal recollection, and not according to what he has since been told. But he is allowed to refresh his memory, when in the box, by looking at any entry or memorandum which he himself wrote or dictated very shortly after the event which it records, or even at an entry made by someone else, but which he saw and read and approved as correct very shortly after the event. It does not matter that the document is not evidence for either party, or even that it should be and is not stamped (*o*). The witness must have in Court the original entry, and not a fair copy of it. Counsel on the other side is entitled to look at any document by which the witness has refreshed his memory, and to cross-examine him on it; and he may, if he thinks fit, put it in evidence.

(*m*) *Greenough* v. *Eccles*, 5 C. B. (N.S.) 786; Cockle, 285.
(*n*) *Jackson* v. *Thomason*, 1 B. & S. 745.
(*o*) *Birchall* v. *Bullough*, [1896] 1 Q. B. 325. In this action, which was brought for money lent, an insufficiently stamped promissory note, purporting to be signed by the defendant and expressed to be given for money lent, was put into the defendant's hands by the plaintiff's counsel for the purpose of refreshing his memory and obtaining from him an admission of the loan. It was held that the plaintiff was entitled to use the note for that purpose, notwithstanding the provision of the Stamp Act, 1891, that an instrument not duly stamped "shall not be given in evidence or be available for any purpose whatever."

II. THE CROSS-EXAMINATION.

When a witness has been thus examined in chief, the opposite party, or his counsel, has the right to cross-examine him. He must put to each of his opponent's witnesses, in turn, so much of his own case as concerns that particular witness or in which that witness had any share. Thus, if the plaintiff has deposed to a conversation with the defendant, it is the duty of the counsel for the defendant to indicate by his cross-examination how much of the plaintiff's version of the conversation he accepts, and how much he disputes, and to suggest what the defendant's version will be. If he asks no question as to it, he will be taken to accept the plaintiff's account in its entirety.

But in all other matters it is often safer to ask too little than too much.

When the examination-in-chief has resulted in clear, conclusive, or unimpeachable evidence, it may be prudent for the adverse party not to cross-examine; for, in such a case, he may by so doing, instead of weakening the evidence, merely strengthen and confirm it. So, too, he will generally not cross-examine a witness, whose evidence he admits, or which cannot possibly injure his case. Reckless cross-examination, moreover, often lets in evidence which before was not admissible.

The objects of cross-examination are to impeach the accuracy, credibility, and general value of the evidence given in chief; to sift the facts already stated by the witness, to detect and expose discrepancies, or to elicit suppressed facts which will

support the case of the cross-examining party. On cross-examination an adverse witness may be asked leading questions (*p*); the reason for excluding such questions in examination-in-chief is not applicable, as the witness is generally adverse to the cross-examiner. Accordingly, either party may put point-blank questions to his opponent's witnesses with the object of discrediting their evidence or of supporting his own case.

If, however, the witness is in fact favourable to the party cross-examining him, it will often weaken the effect of his evidence if he is asked leading questions in cross-examination; and in such a case the Court will sometimes refuse to allow a cross-examiner to lead his opponent's witness (*q*). But ALDERSON, B., has laid it down that the right to lead on cross-examination exists whether the witness be favourable or not (*r*).

Great latitude is permitted in cross-examination, and a cross-examiner will not be stopped by the Court unless the question is manifestly irrelevant and calculated neither to weaken the examination-in-chief nor to impeach the credit of the witness. Questions, clearly irrelevant in examination-in-chief, may be relevant and of the highest importance when asked in cross-examination. In cross-examination, then, a witness (*s*) may be asked any question, however irrelevant to the matter in issue, the answer to which may tend to affect his credit; but he will not always be obliged to answer such question, and if he does answer it, he cannot as a rule be contradicted. He may be asked questions which affect his veracity, such as, whether he has been convicted of a crime;

(*p*) *Per* EYRE, L.C.J., in *R.* v. *Hardy*, 24 How. St. Tr. at p. 755.
(*q*) See the remarks of EYRE, L.C.J., 24 How. St. Tr. at p. 659.
(*r*) *Parkin* v. *Moon*, 7 C. & P. 408; Cockle, 272.
(*s*) A prisoner giving evidence is, of course, not to be asked questions forbidden by the Criminal Evidence Act, 1898. See *ante*, pp. 177 *et seq.*

whether he is a relation, or intimate friend, or under any special obligation, to the party who calls him; whether he is not identified or connected with him in interest; whether he has not been on terms of enmity with the adverse party; whether his memory is not defective generally, or as to the particular transaction; and whether he has been bribed, or paid to give evidence.

By the R. S. C. 1883, Order XXXVI., r. 38—

"The judge may in all cases disallow any questions put in cross-examination of any party or other witness which may appear to him to be vexatious, and not relevant to any matter proper to be inquired into in the cause or matter."

Even in cross-examination, irrelevant questions will be disallowed, if they neither contradict or qualify the result of the examination-in-chief, nor impeach the credit of the witness. Thus, a cross-examiner may not as a rule ask questions of the witness as to his transactions with a third person. Hence, in an action for a nuisance, the defendant's witness cannot be asked in cross-examination whether compensation for a similar nuisance has not been paid by the defendant to a third person in the same position as the plaintiff (*t*). So, as evidence of the mode in which the defendant has contracted with third parties is no evidence of the mode in which he contracted with the plaintiff in the transaction in question, the latter cannot ask a witness in cross-examination upon what terms the defendant contracted with such third parties (*u*). Again, a witness cannot be asked whether a third person had admitted that he and not the party charged was the person liable, for such evidence would be hearsay (*x*); but he may be asked whether such third person is the person to whom credit was given, or who was dealt with as the party primarily liable, and it seems that he may be asked such questions as the foregoing, in order to test his memory or credibility (*u*). If, however, any transaction with a third

(*t*) *Tennant* v. *Hamilton*, 7 Cl. & F. 122.

(*u*) *Hollingham* v. *Head*, 4 C. B. (N.S.) 388; Cockle, 97 (*per* BYLES, J.).

(*x*) *Watts* v. *Lyons*, 6 M. & G. 1047.

party is admissible in chief, it will also be admissible in cross-examination. In an action for a libel published in a newspaper, the fact that the plaintiff has sued for or obtained, or agreed to accept, from other persons compensation for libels to the same effect as that now in question is, by statute, admissible both in chief and in cross-examination (*y*).

Where a question asked in cross-examination appears to be irrelevant, it will not be excluded if the cross-examiner undertakes to show that it is really material (*z*).

If a witness, after being sworn, is not examined in chief, the counsel of the other party has a right to cross-examine, unless the witness has been called under a mistake, *e.g.*, under the mistaken idea that he knew something of the transaction he was called to prove when in fact he knew nothing (*a*).

A witness who has been called by neither party may be called and examined by the judge, and then he is the witness of the judge and not of either of the parties. Then, as Lord ESHER, M.R., said :—

> "The counsel of neither party has a right to cross-examine him without the permission of the judge. The judge must exercise his discretion whether he will allow the witness to be cross-examined. If what the witness has said in answer to the questions put to him by the judge is adverse to either of the parties, the judge would no doubt allow, and he ought to allow, that party's counsel to cross-examine the witness upon his answers. A general fishing cross-examination ought not to be permitted" (*b*).

Whenever a party is compelled by law to call a particular witness, *e.g.*, the attesting witness to a will, he is not the witness of either party, but of the Court; the party calling such a witness may cross-examine him (*c*). And where in an Admiralty action for collision, a compulsory pilot, not called by either party, was allowed to give

(*y*) Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 6.
(*z*) *Haigh* v. *Belcher*, 7 C. & P. 389.
(*a*) *Wood* v. *Mackinson*, 2 M. & Rob. 273 ; Cockle, 271.
(*b*) *Coulson* v. *Disborough*, [1894] 2 Q. B. 316. But see *In re Enoch, etc., Arbitration*, [1910] 1 K. B. at p. 337.
(*c*) *Jones* v. *Jones*, 24 T. L. R. 839.

evidence on his own behalf, the Court allowed cross-examination by both sides (*d*).

When a prisoner calls a witness who incriminates another prisoner, the latter has a right to cross-examine; but it seems there is no such right when the evidence is not criminatory (*e*). So, when a prisoner elects to give evidence on his own behalf under the Criminal Evidence Act, 1898, and in so doing incriminates a fellow-prisoner, the latter has a right to cross-examine him (*f*).

Counsel when cross-examining may, as we have seen, impeach the character of a witness; for this purpose he may ask him whether he has committed any crime, or been guilty of immoral conduct; but, if he denies it, the fact cannot be proved by the cross-examiner unless it be material to the issue (*g*). In other cases the answer of the witness is conclusive: no evidence can be called to contradict it (*h*). But there are exceptions to this rule. By the Criminal Procedure Act, 1865 (*i*), s. 6 (which applies in all Courts, civil as well as criminal), it is enacted that—

"A witness may be questioned as to whether he has been convicted of any felony or misdemeanour, and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the Court or other officer having the custody of the records of the Court where the offender was convicted, or by the deputy of such clerk or officer (for which certificate a fee of five shillings and no more shall be demanded or taken), shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same."

(*d*) *The Cardiff*, [1909] P. 183.

(*e*) *R.* v. *Burditt*, 6 Cox, 458, followed in *R.* v. *Hadwen*, [1902] 1 K. B. at p. 886; but see *R.* v. *Paul and McFarlane*, [1920] 2 K. B. 183.

(*f*) *R.* v. *Hadwen*, *supra*; cf. *R.* v. *McDonell*, 73 J. P. 490.

(*g*) *Harris* v. *Tippett*, 2 Camp. 637; Cockle, 279.

(*h*) *Feret* v. *Hill*, 15 C. B. 207.

(*i*) 28 Vict. c. 18.

This is so, even though the conviction is altogether irrelevant to the matter in issue (*k*).

Again, if a witness is asked whether he ever made a former statement, as to matters in issue, different from the evidence which he has just given in chief, and he denies it, evidence may be given to show that he did make such a statement; but before doing so it is necessary to lay a foundation for such evidence in the cross-examination of the witness by first putting to him all the circumstances under which he is supposed to have made that statement, in order that he may remember the occasion and explain the discrepancy (*l*). Answers to interrogatories already sworn by the witness frequently afford good material for such cross-examination.

A witness who has already given evidence may be recalled for the purpose of proving an "inconsistent statement" made by a subsequent witness (*m*).

There is authority for asserting the existence of a third exception to the rule that the answer of a witness to a question which merely impeaches his credit cannot be contradicted. The decisions were inconsistent; the modern doctrine appears to be that, although such evidence may be given to impeach his general veracity, evidence cannot be given of any particular acts of falsehood or dishonesty, because a witness cannot be expected to be prepared to rebut particular charges or to justify the whole course and details of his private life. A witness, therefore, who is called to impeach the veracity of another witness, can only be asked whether he would believe the other witness on his oath (*n*). When a witness is thus impeached, the party calling him may re-establish his character by calling witnesses to his general character for veracity (*o*).

(*k*) *Ward* v. *Sinfield*, 49 L. J. C. P. at p. 697.

(*l*) See the dictum of ALDERSON, B., in *Attorney-General* v. *Hitchcock*, 1 Ex. at p. 102; Cockle, 283, and ss. 4 & 5 of the Criminal Procedure Act, 1865 (28 Vict. c. 18).

(*m*) *Sykes* v. *Haig*, 44 L. T. 57.

(*n*) *R.* v. *Bispham*, 4 C. & P. 392; *R.* v. *Brown*, L. R. 1 C. C. R. 70.

(*o*) *Annesley* v. *Lord Anglesea*, 17 How. St. Tr. 1430.

Again, as we have seen (*p*), questions may be put to a witness to show that he is actuated by revenge or some other corrupt motive in giving his evidence; and there is some authority for holding that, if he denies it, his statement may be contradicted by other witnesses (*q*). Thus a witness may be asked if he has accepted a bribe, and, if he denies it, other evidence may be called to prove that he did (*r*); but if he is asked whether he has said that he has been offered a bribe, and he denies it, evidence to contradict him is inadmissible (*s*).

The general rule as to impeaching the veracity of one's opponent's witnesses was thus stated by Lord Herschell in the case of *Browne* v. *Dunn* (*t*):—

"I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses."

III. The Re-Examination.

When the cross-examination of the witness is concluded, the party who called him has the right to re-examine him on all matters arising out of the cross-examination for the purpose of reconciling any discrepancies that may exist between the

(*p*) See *ante*, pp. 464, 465.
(*q*) *Thomas* v. *David*, 7 C. & P. 350; Cockle, 287.
(*r*) See *R.* v. *Langhorn*, 7 How. St. Tr. 446.
(*s*) *Attorney-General* v. *Hitchcock*, 1 Ex. 91; cf. *R.* v. *Yewins*, 2 Camp. 638.
(*t*) 6 The Reports, 67.

evidence on the examination-in-chief and that which has been given in cross-examination; or for the purpose of removing or diminishing any suspicion that the cross-examination may have cast on the evidence-in-chief; or to enable the witness to state the whole truth as to matters which have only been partially dealt with in cross-examination. If there has been no cross-examination, there can be no re-examination. No leading questions are allowed in re-examination. And it is, as a rule, unnecessary, and therefore wrong, to repeat any question already put in chief. Only such questions may be asked as are connected with, and arise out of, the cross-examination (*u*); and no questions can be asked in re-examination to introduce new evidence which might have been given in chief (*x*). Thus, in *The Queen's Case* (*x*), Lord TENTERDEN, in delivering the judgment of the Court, said :—

"I think that counsel has a right upon re-examination to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also of the motive by which the witness was induced to use those expressions; but I think he has no right to go further, and to introduce matter new in itself, and not wanted for the purpose of explaining either the expressions or the motives of the witness."

Therefore a witness, who has been cross-examined as to a conversation with a party, cannot be re-examined as to parts of the conversation not connected with the portion to which the cross-examination referred (*y*). If such questions are asked and answered, the witness may be again cross-examined, but such further cross-examina-

(*u*) "The rejection of evidence on this ground is a matter for the discretion of the judge" (*per* CAVE, J., in *Scott* v. *Sampson*, 8 Q. B. D. at p. 506).

(*x*) *The Queen's Case*, 2 B. & B. at p. 297.

(*y*) *Prince* v. *Samo*, 7 A. & E. 627; Cockle, 276.

tion will be confined to the matter so improperly introduced. Where a party has inadvertently omitted to put a question in chief, a judge will usually put it, if requested to do so by counsel, and then will also put questions suggested by the opposing counsel. The re-examination closes the examination of a witness by counsel, but the judge has also a discretionary power to recall a witness at any time for the purpose of putting a question to him.

The judge has a right to interpose at any stage of the proceedings to ask a witness in the box any question which he thinks necessary; but he usually reserves such questions until both counsel have concluded their examination of the witness. Counsel has no right to re-examine upon the Court.

In order that a witness may give his evidence fully, freely and without fear of any consequences, it has always been the law that no action lies against a witness for what he says or does in giving evidence before a Court of justice. Such evidence is absolutely privileged (*z*); and so are his proofs given to the party or his solicitor before the trial (*a*).

What a man says before he enters, or after he has left, the witness box is not privileged; and if a man when in the witness box takes advantage of his position to utter something having no reference to the cause or matter of inquiry, in order to assail the character of another, as if he were asked, "Were you at York on a certain day?" and he were to answer, "Yes, and A. B. picked my pocket there," it certainly might well be said in such a case that the statement was altogether *dehors* the character of witness, and not within the privilege (*b*).

A similar immunity is enjoyed by a witness before a military Court of inquiry, held under the King's

(*z*) *Seaman* v. *Netherclift*, 2 C. P. D. 53.
(*a*) *Watson* v. *Jones*, [1905] A. C. 480.
(*b*) *Per* COCKBURN, C.J., in *Seaman* v. *Netherclift*, *supra*.

Regulations (*c*), and of a witness examined before a Select Committee of the House of Commons (*d*). Now, by the Witnesses (Public Inquiries) Protection Act, 1892 (*e*), s. 2:—

"Every person who commits any of the following acts, that is to say, who threatens, or in any way punishes, damnifies, or injures, or attempts to punish, damnify, or injure, any person for having given evidence upon any inquiry, or on account of the evidence which he has given upon any such inquiry, shall, unless such evidence was given in bad faith, be guilty of a misdemeanour, and be liable upon conviction thereof to a maximum penalty of one hundred pounds, or to a maximum imprisonment of three months";

and by sect. 1:—

"In this Act the word 'inquiry' shall mean any inquiry held under the authority of any Royal Commission, or by any Committee of either House of Parliament, or pursuant to any statutory authority, whether the evidence at such inquiry is or is not given on oath, but shall not include any inquiry by any Court of justice."

(*c*) *Dawkins* v. *Lord Rokeby*, L. R. 7 H. L. 744.
(*d*) *Goffin* v. *Donnelly*, 6 Q. B. D. 307.
(*e*) 55 & 56 Vict. c. 64.

CHAPTER V.

CONSTRUCTION OF DOCUMENTS.

When a material document has been properly proved and put in evidence, it is the province of the judge to construe it, though it is for the jury, if there be one, to find any facts which may be necessary to enable him so to do. But in endeavouring to arrive at the true meaning of any document the judge will always be guided by certain well-known canons of construction.

1. The first and fundamental rule is that everyone must be taken to mean what he has written. The judge will always, in the first place, endeavour to arrive at his meaning by studying the document which he has written or signed. It is only if that study fails, that the judge will seek for an interpretation outside the four corners of the document.

2. In construing what has been written, the judge will give to ordinary English words their ordinary English meaning.

3. The judge will give to technical legal words their technical legal meaning.

4. It may be, however, that the document contains words which are neither ordinary English nor technical legal terms. Parol evidence is admissible to explain the special meaning of such words, if they have any. For instance, the

document may be written in a foreign language which needs interpretation.

5. Parol evidence is also admissible to show that in any given document a word which at first sight seems ordinary English is used in some peculiar sense in a particular trade or locality. If such evidence be given, it will be for the jury to find whether such word is in fact used with a technical or local meaning, and, if so, what that technical or local meaning is; and the judge, in construing the document, will give that word that meaning.

6. Again, there are words which have both a strict and proper meaning, and also a loose and popular meaning, *e.g.*, "children" (which may or may not include illegitimate children), and "brothers and sisters" (which may or may not include half-brothers and sisters) (*a*). The judge will give to such words their strict and proper meaning, unless it be clear that the writer used the words in their loose popular meaning.

7. Where the words, as they stand, are quite clear and intelligible, but it turns out that they can apply equally well to two or more persons, or two or more things, this is a "latent ambiguity," and parol evidence is admissible to show which was really meant. This is not contradicting the document, because each answers the written words equally well. A "patent ambiguity," on the other hand, is one which appears on the face of the document and renders it unintelligible.

(*a*) *In re Cozens*, [1903] 1 Ch. 138; but see *In re Dowson*, [1909] W. N. 245, where JOYCE, J., held that the words "my own brothers and sisters" did not include brothers and sisters of the half-blood.

8. Having thus settled the meaning of each word, the judge will proceed to construe the document as a whole, not divorcing isolated passages from their context, but giving due weight to every part. He will avoid, if possible, a construction which will render any portion of the document nugatory or meaningless.

We proceed to discuss each of these rules separately.

1. The primary canon needs no explanation; it is merely a rule of common sense. The parties have expressed their intentions in writing, and the Court will take it for granted that they know and approve of what is written and are willing to be bound by it. The fact that they have put their wishes down on paper shows that they meant that paper to be the main, if not the only, guide to their intentions; and, in construing it, the judge should not permit his mind to be distracted from the study of the written words by listening to the parol evidence of irresponsible strangers who suggest interpretations of their own invention. Nor will the parties themselves be allowed subsequently to suggest that they did not mean what they have said.

2. Common sense also dictates the second rule. It is obviously right that anyone who is construing a document in English should give to ordinary English words their ordinary English meaning. A witness cannot be called and asked what he understands by a plain sentence in English (*b*). Words which have a clear and fixed meaning cannot in the absence of special circumstances (*c*) be shown by extrinsic evidence to have been used by the parties to mean something different. Even the fact that the parties in their subsequent business transactions have put a different construction on the language is

(*b*) *Dowling* v. *Pontypool, etc., Rail. Co.*, L. R. 18 Eq. 714; and see *In re Lewis, Prothero* v. *Lewis*, [1910] W. N. 6.

(*c*) See, for instance, *R.* v. *King*, [1897] 1 Q. B. 214.

immaterial (*d*), though, as we shall see hereafter, evidence may be admissible to show that in a particular trade, or in a particular part of the country, an ordinary English word conveys a technical or local meaning.

In the case of *North-Eastern Rail. Co.* v. *Hastings* (*e*), Lord HALSBURY stated the law thus:—

"No principle has ever been more universally or rigorously insisted upon than that written instruments, if they are plain and unambiguous, must be construed according to the plain and unambiguous language of the instrument itself."

In the same case Lord BRAMPTON said (*f*), with reference to the deed on which the action was brought:—

"It seems to me to be clear and free from ambiguity, and incapable of any other construction than that assigned to it by the respondent. Certainly there is nothing to be found in the rest of the agreement to suggest any other interpretation. But it is said that it must have been differently understood by the parties themselves, and that the omission by the plaintiff and his predecessor for upwards of forty years to claim the rents now sought to be recovered is cogent evidence that such was the case. I grant that if the clause were capable of two constructions, one of which would support, the other of which would defeat the claim, the omission would afford irresistible proof that the latter was the interpretation intended by the parties. No such ambiguity, however, exists, and it seems therefore to me that, in the absence of any proof to the contrary, it must be assumed that the parties knew and understood the language they were using, and that in executing the agreement containing that clause they were truly expressing their intentions, and are bound by the writing they have signed. Why the agreement was so framed—what were the considerations which induced it—and why the claim was so long allowed to sleep are mere matters of speculation; but one has no right to act upon speculation to set aside a deed or agreement which is on the face of it clear and definite."

This rule is well illustrated by the decisions given in actions of slander, which though not precisely in point—for we are here dealing with documents—are yet closely analogous to our subject. Thus, in *Daines and another* v. *Hartley* (*g*), a witness was called at the trial who deposed that in a conversation with the defendant he mentioned

(*d*) *London County Council* v. *South Metropolitan Gas Co.*, [1904] 1 Ch. 76.
(*e*) [1900] A. C. 260, at p. 263.
(*f*) [1900] A. C., at p. 270.
(*g*) 3 Ex. 200; and see *Barnett* v. *Allen*, 3 H. & N. 376; and *Gallagher* v. *Murton*, 4 T. L. R. 304.

that his firm held some bills of the plaintiffs', and that the defendant replied, "You must look out sharp that they are met by them." The counsel for the plaintiffs then proposed to ask him: "What did you understand by that?" But the question was objected to, and disallowed by the judge (POLLOCK, C.B.). The jury found a verdict for the defendant, and the Court of Exchequer refused to grant a new trial. So, where it is important to prove an innuendo and that the obvious and natural meaning of a word was not the one which the speaker intended to convey to the witness, the witness cannot be asked what he understood by the language; for the answer to such a question would be in the nature of an inference and a mere personal opinion; but questions may be put to him which tend to elicit all the surrounding facts and circumstances which led him to understand the words in a slanderous sense, and he may be asked whether there was irony in the speaker's tone at the time, and generally whether there was anything to prevent him from understanding the words in their ordinary sense (*h*).

3. The judge will give to technical legal words their technical legal meaning (*i*). For example, a grant of freeholds to A. in fee simple will be construed as a grant of the entire freehold. So, too, the phrase "chattels real" has a definite meaning in law, and a bequest of "all my chattels real and personal" will not pass the testator's freeholds or copyholds, but a bequest of "all my effects both real and personal" will, because the word "effects" has in law no technical meaning (*k*). So a person who is expressly designated to be a "residuary legatee" cannot, in the absence of special circumstances, take as "residuary devisee" (*l*). Unless the document itself shows that another meaning was intended, words of weight, measure and number to which a particular meaning has been assigned by statute, must be given

(*h*) *Boydell* v. *Jones*, 4 M. & W. 446.
(*i*) *Leach* v. *Jay*, 9 Ch. D. 42.
(*k*) *Smyth* v. *Smyth*, 8 Ch. D. 561; *Hall* v. *Hall*, [1892] 1 Ch. 361.
(*l*) *In re Gibbs*, [1907] 1 Ch. 465.

that meaning, and no extrinsic evidence will be admitted to show that the parties meant something different (*m*). So, also, the names of the quarter days in leases and other documents refer to the days on which they now fall, and not to those on which they fell under the "old style" (*n*). The words "City of London" have also a definite legal meaning (*o*), so that where a dentist in Bloomsbury Street, London, W.C., made his manager covenant never to practise as a dentist in either of the cities of London or Westminster, and the manager ejected him from the house in Bloomsbury Street and carried on the business there as his own, it was held that the covenant did not apply, as Bloomsbury is not strictly in either of those cities, although it was obviously the intention of the parties to include the whole metropolis, and certainly Bloomsbury. So the words "rent" and "term" are words of art, and consequently will receive their ordinary legal meaning unless the context makes another meaning necessary (*p*).

In ordinary legal documents the Court always construes the word "month" as meaning "lunar month," unless the context requires another meaning, but in commercial documents the word "month" always means "calendar month" (*q*).

Even silence may have a technical legal meaning. Thus, if an agent signs a document on behalf of a principal without adding words to show that he is signing merely as agent for his principal, he will be personally liable. And, if an agreement for the purchase of goods says nothing as to the time of payment for them, the Court will construe it as meaning that the goods are to be paid for on delivery (*r*).

(*m*) *Smith* v. *Wilson*, 3 B. & Ad., at pp. 731—734.
(*n*) *Doe* v. *Lea*, 11 East, 312; *Doe* v. *Benson*, 4 B. & Ald. 588.
(*o*) *Mallan* v. *May*, 13 M. & W. 511.
(*p*) *Lord Llangattock* v. *Watney, Combe, Reid & Co., Ltd.*, [1910] 1 K. B. 236, 245 (affirmed, [1910] A. C. 394).
(*q*) *Jolly* v. *Young*, 1 Esp. 186; *Simpson* v. *Margitson*, 11 Q. B. 23; *Bruner* v. *Moore*, [1904] 1 Ch. 305.
(*r*) *Ford* v. *Yates*, 2 Man. & G. 549.

4 and 5. If the document contains words which are neither ordinary English nor technical legal terms, parol evidence is admissible to explain them. Parol evidence is also admissible to show that in any given document a word which at first sight seems ordinary English is used in some peculiar sense in a particular trade or locality.

It is convenient to treat of the considerations affecting both these classes of words together.

Where a written instrument is in a foreign language, or where it contains technical words of trade or custom, oral or other extrinsic evidence will be received to inform the Court of the sense of the instrument. Thus, in *Shore* v. *Wilson*, PARKE, B., said:—

"I apprehend that there are two descriptions of evidence . . . which are clearly admissible for the purpose of enabling a Court to construe any written instrument, and to apply it practically. In the first place, there is no doubt that not only when the language of the instrument is such as the Court does not understand, it is competent to receive evidence of the proper meaning of that language, as when it is written in a foreign tongue; but it is also competent, where technical words or peculiar terms are used, or, indeed, any expressions which at the time when the instrument was written had acquired an appropriate meaning, either generally or by local usage, or amongst particular classes. . . . This description of evidence is admissible in order to enable the Court to understand the meaning of the words contained in the instrument itself, by themselves, and without reference to the extrinsic facts on which the instrument is intended to operate" (*s*).

When a document is in a foreign language, the Court requires a translation by a competent translator; and if there are technical expressions in the document, expert evidence must be given to explain to the Court what meaning those words would convey to people in whose language the document is written (*t*). Before admitting evidence of the secondary meaning of a word, the Court must be satisfied from the instrument itself, or from the circumstances of the case, that the word ought to be construed not in its ordinary and primary signification, but according to its secondary meaning (*u*).

(*s*) 9 Cl. & F. 355.

(*t*) See *Chatenay* v. *Brazilian Telegraph Co.*, [1891] 1 Q. B. 79; cf. *Di Sora* v. *Phillipps*, 10 H. L. Cas., at p. 633.

(*u*) See the judgment of FRY, J., in *Holt & Co.* v. *Collyer*, 16 Ch. D. 718.

Thus, extrinsic evidence was received to explain the meaning of the phrase, "Godly preachers of Christ's Holy Gospel," and to show that according to the usage of a sect to which the grantor belonged, the grant was intended for that sect (*x*). So, such evidence has been received to explain the meaning of the phrase "across a country" in a steeplechase transaction (*y*); that "close," by local usage, signified "a farm" (*z*); and that a contract to pay an actor so much a week was a contract to pay only during the theatrical season (*a*). So, also, it has been received to explain the local meaning of "good" or "fine" barley (*b*), to identify the property described in a contract of sale as "my house in town," or to define the quantity of wool sold as "your wool" (*c*); and, generally, in all cases where the signification of a particular phrase is unsettled and variable in its nature, and where it is liable to have different senses attached to it in different places.

Usage or custom is also admissible to explain and control, but not to contradict, a written instrument, such as a contract. It may be admissible to explain what is doubtful; it is never admissible to contradict what is plain (*d*). Thus, wherever the language of a written instrument is so clear that there can be no reasonable ground for construing it as subject to a custom, or where, although the language is ambiguous, the custom itself is uncertain, the writing must be construed strictly according to its literal terms (*e*).

On the general principle, it has been held allowable to show that, by the custom of the country, a provision

(*x*) *Shore* v. *Wilson*, 9 Cl. & F. 355.
(*y*) *Evans* v. *Pratt*, 3 Man. & G. 759.
(*z*) *Richardson* v. *Watson*, 4 B. & Ad., at p. 799.
(*a*) *Grant* v. *Maddox*, 15 M. & W. 737.
(*b*) *Hutchinson* v. *Bowker*, 5 M. & W. 535.
(*c*) *Macdonald* v. *Longbottom*, 29 L. J. Q. B. 256.
(*d*) *Per* Lord CAMPBELL in *Hall* v. *Janson*, 4 E. & B. 500; and see *The Nifa*, [1892] P. 411; *In re Sutro & Co. and Heilbut, Symons & Co.*, [1917] 2 K. B. 348; *Watcham* v. *Att.-Gen. of the East Africa Protectorate*, [1919] A. C. 533.
(*e*) *In re Stroud*, 8 C. B. 502; *Hurst* v. *Usborne*, 18 C. B. 144.

in a lease as to ten thousand rabbits signified twelve hundred to the thousand (*f*); and that where nothing is said in the lease, the outgoing tenant is entitled to the away-going crop (*g*). In such cases it will be for the jury to find whether such word or phrase is in fact used with a technical or local meaning, and if so, what that technical or local meaning is, and the judge in construing the document will give that word or phrase that meaning. If the jury find it is in fact *not* used with a technical or local meaning, then it is for the judge to give it its proper legal signification and construe the document accordingly. Thus, where an auctioneer sued for a sum which he was to receive under a written contract, only if he sold "within two months," it was held that, in the absence of admissible extrinsic evidence, this meant in point of law two lunar months, and that, unless the context, or the circumstances of the contract, showed that the parties meant two calendar months, the conduct of the parties to the written contract alone was not admissible to withdraw the construction of a word in it which had a settled primary meaning from the judge and transfer it to the jury (*h*). In general, where there are two alternative constructions, both of which are possible, evidence of usage will be received to determine which is the right one (*i*). Thus evidence was admitted to explain the ambiguous word "shares" in a memorandum of association (*k*). But in order to admit extrinsic evidence the phrase need not be ambiguous on the face of it (*l*).

Where a doubt is raised by evidence upon the meaning of a written contract, or where the contract contains words which have more than one meaning (*m*), to remove such doubts, extrinsic evidence is admissible

(*f*) *Smith* v. *Wilson*, 3 B. & Ad. 728.
(*g*) *Wigglesworth* v. *Dallison*, 1 Doug. 201.
(*h*) *Simpson* v. *Margitson*, 11 Q. B. 23.
(*i*) *Blackett* v. *Royal Exchange Assurance Co.*, 2 C. & J., at p. 249.
(*k*) *Mason* v. *Motor Traction Co.*, [1905] 1 Ch. 419.
(*l*) *Per* BLACKBURN, J., in *Myers* v. *Sarl*, 3 E. & E., at p. 319.
(*m*) *Buckle* v. *Knoop*, L. R. 2 Ex. 125, 333.

of the usage or course of trade at the place where the contract is made, or where it is to be carried into effect. Thus, evidence is admissible to show that in the trade the word "bale" means a "bale" of a particular kind having a definite weight (*n*); that the words "wools" and "bankers" have a special meaning in the trade of the person who used them (*o*); to explain the meaning of "regular terms of loading" (*p*), "lay days," and other terms used in the shipping trade. So, where the question was whether goods were to be liable to freight according to their weight at the place of shipment, or according to their expanded weight at the place of consignment, the terms of the charter-party were construed by extrinsic evidence that the usage was to measure the goods according to their weight at the place of shipment (*q*); and where the question was as to the date of the arrival of the ship at the port named in the charter-party, evidence was admitted to show what spot in the port must be reached before, by the usage of the port, it was considered that the ship had arrived (*r*).

Again, it may be shown that by the usage of trade an inferior kind of palm oil answers to the description of "best palm oil" (*s*); or that by the custom of the building trade the words "weekly accounts" refer to regular day work only (*t*); or that credit "for six or eight weeks" does not necessarily give the whole eight weeks for payment of goods (*u*). Evidence of surrounding circumstances is admissible to show that a guarantee was intended to be a continuing one where this was not obvious from the language of the document taken by itself (*x*).

But the custom cannot prevail over the express words

(*n*) *Gorrissen* v. *Perrin*, 2 C. B. (N.S.) 681.
(*o*) *Goblet* v. *Beechey*, 2 Russ. & My. 624.
(*p*) *Leidemann* v. *Schultz*, 14 C. B. 38.
(*q*) *Bottomley* v. *Forbes*, 5 Bing. N. C. 121.
(*r*) *Norden* v. *Dempsey*, 1 C. P. D. 654.
(*s*) *Lucas* v. *Bristow*, E. B. & E. 907.
(*t*) *Myers* v. *Sarl*, 3 E. & E. 306.
(*u*) *Ashforth* v. *Redford*, L. R. 9 C. P. 20.
(*x*) *Heffield* v. *Meadows*, L. R. 4 C. P. 595.

of the instrument (*y*), and therefore evidence of a custom, inconsistent with an arbitration clause in a bought note, was held inadmissible (*z*). Whenever the parties have come to an express contract, this will preclude any implied contract, in spite of any custom in the trade (*a*). It seems that no trade usage will be binding on a party unless he knew, or under the circumstances must be taken to have known, of its existence, and contracted with reference to it (*b*). The mere habit of affixing a special meaning to words in one class of contracts cannot amount to a custom of trade, so as to control a written agreement (*c*).

But this rule only applies where the word in question is understood in the special sense by a large number of people who reside in the particular locality or are engaged in the particular trade; and it will not be allowable to show that a party used the term in a sense peculiar to himself and opposed to its local and conventional usage. Thus, where a testatrix was in the habit of treating certain shares as "double shares," evidence of this was not allowed to influence the construction of her will, Sir W. PAGE WOOD, V.C., saying:—

"I must take things to be as I find them, and I cannot allow particular expressions, said to have been used by this testatrix, to prevail where they are not the general language universally applicable to the particular subject-matter" (*d*).

6. Where ordinary English words have, apart from any local or trade custom, both a strict meaning, and also a loose and popular meaning, the judge will give them their strict meaning, unless it be clear that the writer used the word in its popular meaning. Extrinsic evidence is

(*y*) *Blackett* v. *Royal Exchange Assurance Co.*, 2 C. & J. 244; *Suse* v. *Pompe*, 8 C. B. (N.S.) 538.
(*z*) *Barrow* v. *Dyster*, 13 Q. B. D. 635.
(*a*) *Cutter* v. *Powell*, 2 Sm. L. C. 1.
(*b*) *Kirchner* v. *Venus*, 12 Moo. P. C. 361.
(*c*) *Abbott* v. *Bates*, 24 W. R. 101.
(*d*) *Millard* v. *Bailey*, L. R. 1 Eq., at p. 382; and see *per* BLACKBURN, J., in *Grant* v. *Grant*, L. R. 5 C. P., at p. 728.

admissible to show that the writer did so use the word (*e*). Thus "lands" before the Wills Act meant freeholds only, not leaseholds, unless there were no freeholds; and "children" in a will always means legitimate children, unless, on the facts being ascertained and applied to the words of the will, some repugnancy or inconsistency would result from so interpreting it (*f*).

The strict sense of a word is its legal sense; and if it be intelligible in this sense, it cannot be varied or explained by evidence that it was used by the party in a popular sense, or in one peculiar to himself (*g*). Thus, if a man devises freeholds to his "children" and he has both legitimate and illegitimate children, only the former will take; extrinsic evidence cannot be received to show that he intended that his illegitimate children should also take. But, where there are no legitimate children to take, the illegitimate will. So, where there is a devise to "children," and the evidence shows only one legitimate child, and children who are illegitimate, the latter will take equally with the former (*h*). In such a case the extrinsic evidence of a collateral fact is strictly admissible to explain a written instrument which would otherwise have no meaning. Where a testator uses a word capable of many meanings, such as "issue" or "nephews and nieces" (*i*), it must be gathered from the will in what sense he has used it (*k*).

But although extrinsic evidence is admissible to explain a written document, it does not follow that declarations of intention by the parties will be received. In almost all such cases the extrinsic evidence will be confined to collateral and surrounding facts, which are so connected with the substantial issue that they reasonably afford *data* to aid the Court or jury in construing the language

(*e*) *Bank of New Zealand* v. *Simpson*, [1900] A. C. 182.
(*f*) *Per* Lord SELBORNE in *Dorin* v. *Dorin*, L. R. 7 H. L. 577.
(*g*) See *per* BLACKBURN, J., in *Grant* v. *Grant*, L. R. 5 C. P., at p. 728.
(*h*) *Gill* v. *Shelley*, 2 Phill. 373.
(*i*) *In re Corsellis*, [1906] 2 Ch. 316.
(*k*) *Kenyon* v. *Birks*, [1900] 1 Ch. 417.

of the document (*l*). They must not be personal declarations of the party, but distinct incidents, which may be presumed to have been present to his mind at the time he wrote the words (*m*).

7. The law recognises, according to the authority of Lord BACON, two kinds of ambiguities in written instruments, viz., patent and latent.

A patent ambiguity is said to exist when the instrument, on its face, is unintelligible, as where a gift is made by will, and a blank appears in the place of the name of the devisee or legatee. In such a case extrinsic evidence is wholly inadmissible to show who was intended to be the devisee or legatee; for, if it were admissible, it would be tantamount to permitting wills to be made verbally. Nevertheless if a christian name is stated in a will, followed by a blank for the surname, extrinsic evidence will be admitted to show whom the testator intended to designate (*n*). And generally, although a complete blank in a will cannot be filled up, a partial blank may be explained by extrinsic evidence (*o*). Such evidence has also been admitted to rebut the presumption against an executor taking the residue beneficially, where a specific legacy is left to him and where the frame of the will also strengthens this inference (*p*).

Although extrinsic evidence is not admissible to explain a patent ambiguity, nevertheless it is open to the Court to study the document as a whole, and to ascertain from the context, if possible, what was the word which the writer has omitted. Thus, in *Mourmand* v. *Le Clair* (*q*), the action was brought on a bill of sale to secure a loan of £70 and interest at 1*s.* in the pound per month, which stipulated that the principal and interest should be repaid by monthly instalments of "seven" on a certain date in each month. It was held,

(*l*) *Smith* v. *Thompson*, 8 C. B. 44.
(*m*) This matter is dealt with later under "Wills," *post*, pp. 492, 493.
(*n*) *In the Goods of De Rosaz*, 2 P. D. 66.
(*o*) *In the Estate of Hubbuck*, [1905] P. 129.
(*p*) *Camp* v. *Coe*, 31 Ch. D. 460.
(*q*) [1903] 2 K. B. 216.

that as, having regard to the amount of the monthly interest, the bill of sale could only be paid off if the repayments were at the rate of £7 per month, the bill of sale was not rendered invalid by the omission of any unit of monetary denomination after the word "seven," and was not void as not being in accordance with the form in the schedule to the Bills of Sale Act, 1882.

On the other hand, where a written instrument is intelligible on the face of it, but a difficulty arises from extrinsic circumstances in understanding and carrying out its terms, the ambiguity is said to be latent, and extrinsic evidence will be admissible to explain and apply those circumstances, so as to reconcile them to the terms of the writing. The difficulty which has been raised by evidence of extrinsic circumstances may also be solved by such extrinsic evidence. Thus, where the words as they stand are quite clear and intelligible, but it is shown to the Court that they can apply equally well to two or more persons or two or more things, this is a latent ambiguity, and parol evidence will be admissible of all the surrounding circumstances. This is not contradicting the document, because each answers the written words equally well.

Such evidence is admissible only to explain, and not to vary the document. Thus, in *Goldshede* v. *Swan* (*r*), PARKE, B., said:—

> "You cannot vary the terms of a written instrument by parol evidence; that is a regular rule; but if you can construe an instrument by parol evidence, when that instrument is ambiguous, in such a manner as not to contradict, you are at liberty to do so."

To the same effect are the following remarks of Sir JAMES WIGRAM (*s*):—

> "A written instrument is not ambiguous because an ignorant and uninformed person is unable to interpret it. It is ambiguous only if found to be of uncertain meaning when persons of competent skill and information are unable to do so. Words cannot be ambiguous because

(*r*) 1 Ex., at p. 158.
(*s*) On Extrinsic Evidence in Aid of the Interpretation of Wills, 2nd ed., p. 130.

they are unintelligible to a man who cannot read, nor can they be ambiguous merely because the Court which is called upon to explain them may be ignorant of a particular fact, art, or science, which was familiar to the person who used the words, and a knowledge of which is therefore necessary to a right understanding of the words he has used."

In an action arising out of a contract to accept goods which were to arrive by a particular ship, it appeared that there were two ships of the same name, and parol evidence was admitted to show which ship was meant (*t*). So it has been held, in spite of the provisions of the Statute of Frauds, that extrinsic evidence was admissible to prove who was the buyer and who the seller in a memorandum or note of the sale of goods (*u*), and what is the subject-matter of a written contract to sell twenty-four acres of land (*x*). Where the defendants had by a deed covenanted to pay the plaintiff a royalty on all articles manufactured or sold "under the powers hereby granted," but the deed did not on the face of it disclose what the powers were, it was held to create a latent ambiguity on the face of the deed, and extrinsic evidence was admitted to prove what was intended by the parties (*y*). So, parol evidence has been admitted to show whether an instrument was intended as a deed poll or as a will (*z*).

8. Having thus settled the meaning of each word, the judge will proceed to construe the document as a whole, not divorcing isolated passages from their context, but giving due weight to every part. He will, if possible, avoid a construction which will render any portion of the document nugatory or meaningless.

Although the dispute between the parties may be limited to the construction of a particular clause, nevertheless the same words may occur in other portions of the document, and it is obviously right to refer to these

(*t*) *Raffles* v. *Wichelhaus*, 2 H. & C. 906.
(*u*) *Newell* v. *Radford*, L. R. 3 C. P. 52.
(*x*) *Plant* v. *Bourne*, [1897] 2 Ch. 281.
(*y*) *Roden* v. *London Small Arms Co.*, 46 L. J. Q. B. 213.
(*z*) *In the Goods of Slinn*, 15 P. D. 156. See further as to patent and latent ambiguities in a will, *post*, pp. 492 *et seq.*

other portions, as they may throw light on the true meaning of the clause in dispute (*a*). So the operative part of a document may be prefaced by recitals, which will often furnish an excellent test for discovering the real intention of the parties and thus enable the Court to arrive at the true meaning of the operative part (*b*).

Parties, however, often fill up printed forms of wills or contracts (*e.g.*, charter-parties, bills of lading and policies of assurance). In construing these the Court naturally attaches more importance to the words which have been written in than to the printed words of the form (*c*); for the former are the words of the parties themselves. Nevertheless, it is still the duty of the Court, if possible, to construe the document as a whole, giving weight to both the printed and the written words. It is only where the written words are irreconcilable with the printed form that the written words will prevail (*d*).

Thus, in *Badeley* v. *Consolidated Bank* (*e*), in which case the Court had to construe a deed which was alleged to constitute a partnership, COTTON, L.J., said:—

"When the participation in profits arises from a clause in an agreement entered into between the parties, it is wrong to say that this is *primâ facie* evidence of a partnership, because you must look not only to that stipulation, but to all the other stipulations in the contract, and determine whether on the stipulations of the contract taken as a whole you can come to the conclusion that there is a partnership—that there is a joint business carried on on behalf of the two—or whether the transaction is one of loan between debtor and creditor, a loan secured by giving a certain interest in the profits."

NORTH, J., referring to this decision in *Davis* v. *Davis* (*f*), said:—

"It is true that that case was decided before the Act of 1890 (*g*) was passed, but the Act seems to me to give effect to what was there laid down. . . . Adopting then the rule of law which was laid down

(*a*) *Blundell* v. *Gladstone*, 11 Sim. 486.
(*b*) *Walsh* v. *Trevanion*, 15 Q. B. 733.
(*c*) *Robinson* v. *French*, 4 East, 130, p. 136.
(*d*) *Gunn* v. *Tyrie*, 6 B. & S. 298; *Jessel* v. *Bath*, L. R. 2 Ex. 267.
(*e*) 38 Ch. D., at p. 250.
(*f*) [1894] 1 Ch., at pp. 398, 399.
(*g*) 53 & 54 Vict. c. 39.

before the Act, and which seems to me to be precisely what is intended by sect. 2, sub-sect. 3, of the Act, the receipt by a person of a share of the profits of a business is *primâ facie* evidence that he is a partner in it, and, if the matter stops there, it is evidence upon which the Court must act. But, if there are other circumstances to be considered, they ought to be considered fairly together; not holding that a partnership is proved by the receipt of a share of profits, unless it is rebutted by something else; but taking all the circumstances together, not attaching undue weight to any of them, but drawing an inference from the whole."

Thus, as we have seen, the word "close" may, by the custom of the country in which the testator resided, be extended to cover a whole "farm," but if it appear that in other parts of the will the word was employed in its technical legal meaning of an enclosure, it is only reasonable to conclude that it bears the latter meaning throughout the whole will, and no parol evidence to show the contrary will be admitted.

This rule is also illustrated by the decision that where a party gives a portion of a writing in evidence, the adverse party is entitled to have read all other passages which are connected with, or construe, control, modify, qualify, or explain, the passages which have been read; but not distinct passages, or passages which are irrelevant to, or not explanatory of, such first-mentioned passages (*h*).

It may be convenient to add here a few remarks on alterations and interlineations in a document. Extrinsic evidence is not only admissible, but necessary, to explain any alteration or interlineation that may appear in a written instrument. Such evidence does not vary the transaction, but only proves the condition of the document when it first came to have an effect in law (*i*). As a general rule the party tendering it in evidence must account for the alteration (*k*). If it appears to have been made contemporaneously with the instrument, or if it was made subsequently to its execution, with the privity of the parties, and there is no fraud

(*h*) *Darby* v. *Ouseley*, 1 H. & N. 1.
(*i*) *Stewart* v. *Eddowes*, L. R. 9 C. P. 311.
(*k*) *Clifford* v. *Parker*, 2 Man. & G. 909.

upon, nor invasion of, the stamp laws, its validity may be maintained, provided it is an immaterial alteration (*l*); but not if the alteration is material (*m*). What is immaterial depends to a great extent upon the nature of the particular instrument; but if the date (*n*), or amount, or time of payment of a bill of exchange be altered (*o*), or a joint responsibility is converted into a joint and several responsibility (*p*), the instrument will be void, unless the alteration was made by consent of the parties; and equally so, although made with consent, if the stamp laws are infringed (*q*). Where a bill has been altered with the privity of an indorser and his indorsee, but without the privity of the acceptor, the latter is discharged (*r*). The same rule holds when the alteration is accidental (*s*), or by a stranger without the privity of either party (*t*). Parol evidence may be called to show that a variation between a bought note and a sold note is immaterial (*u*).

In the case of wills, s. 21 of the Wills Act, 1837, provides that no obliteration, interlineation, or other alteration made after execution shall have any effect except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration is executed as provided by the section.

The foregoing rules govern the construction of all documents—of wills and Acts of Parliament as well as of deeds, contracts, and other commercial instruments. But special rules apply to certain

(*l*) *In re Howgate and Osborn's Contract*, [1902] 1 Ch. 451.
(*m*) *Suffell* v. *Bank of England*, 9 Q. B. D. 555.
(*n*) *Clifford* v. *Parker*, 2 Man. & G. 909.
(*o*) *Warrington* v. *Early*, 2 E. & B. 763.
(*p*) *Alderson* v. *Langdale*, 3 B. & Ad. 660.
(*q*) *Perring* v. *Hone*, 4 Bing. 28.
(*r*) *Master* v. *Miller*, 1 Sm. L. C. 803.
(*s*) *Burchfield* v. *Moore*, 3 E. & B. 683.
(*t*) *Davidson* v. *Cooper*, 13 M. & W., at p. 352; *Croockewit* v. *Fletcher*, 1 H. & N. 893.
(*u*) *Holmes* v. *Mitchell*, 7 C. B. (N.S.) 361.

particular classes of documents; and these we will proceed to discuss.

Wills and Deeds.

In the case of wills certain special rules have been laid down by the Court of Chancery and by statute which settle the construction to be placed upon certain words and special phrases when they occur. Hence the same word or phrase may have one meaning in a will and another in a deed. Thus a devise "to A." *simpliciter* will pass to him the testator's whole property in the land (*x*); the same words in a deed will convey only a life estate. So certain words which in a will imply an estate tail will not be so construed if they occur in a deed.

But apart from these special provisions a will must be construed according to the same general principles as other documents. The judge will endeavour to arrive at the intention of the testator by studying the language of the will. If the meaning of that language is clear, it must be followed, however improbable it may seem from extraneous matters that the testator intended so to dispose of his property. No parol evidence is admissible to override the words of the will if they be clear and unambiguous: or, in the words of JOYCE, J., in *In re Glassington* (*y*):—

"Parol evidence is not to be resorted to except for the purpose of proving a fact which will make intelligible something in the will that, without the aid of extrinsic evidence, would not be intelligible."

(*x*) Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26), s. 28; and see Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 10.

(*y*) [1906] 2 Ch., at p. 314; and see *In re Raven*, [1915] 1 Ch. 673.

If, however, any clause in a will is fairly capable of more than one meaning, then the judge will in the first place study the rest of the will, and by the light derived from this he may be able to determine which of the various meanings the testator really intended his words to bear. It may appear from the rest of the will that the testator had, so to speak, a language of his own, *e.g.*, that he used the word "niece" to include a great-niece or his wife's niece (*z*).

Should the context, however, throw no light upon the matter, then *ex necessitate rei* a certain amount of extrinsic evidence is admissible to enable the judge to discover the testator's intention.

If there be a patent ambiguity in the language of a will, the defect cannot be cured by parol evidence. But if the facts disclose a latent ambiguity, some parol evidence is admissible to remove the difficulty which parol evidence has raised. Thus, if there is no one who exactly answers to the description given in a will of an intended legatee, but there are two or more persons, any one of whom the testator may have intended so to benefit, parol evidence is admissible of all the "surrounding circumstances," in order to place the Court so far as possible in the position in which the testator stood when he dictated his will. In such a case evidence may be given of the relationship of each of the claimants to the testator and of the degree of their intimacy with him, but not of any parol declarations made by the testator in his life-

(*z*) See, for instance, *Stringer* v. *Gardiner*, 27 Beav. 35; and *In re Corsellis*, [1906] 2 Ch. 316.

time as to his intentions to benefit this or that person (*a*); nor can the instructions to his solicitor to prepare his will or any draft of it be produced and read (*b*); but if a statement made by the testator as to his various relatives is admissible on other grounds, it will not be excluded merely because it is contained in such instructions (*c*). If, however, the testator in the will alludes to any of his relatives or friends by a pet name or a nick-name, parol evidence is admissible to show the identity of the person whom the testator in his lifetime was in the habit of calling by that name (*d*).

But when there are two or more persons or things, and each of them exactly answers to the description in the will, then all manner of parol evidence is admissible (*e*), for the language of the will is complied with whichever person receives the legacy or whichever thing passes under the bequest. This is called a case of equivocation.

Nevertheless, the real question always is, What do the words of the will mean? Not, What do we suppose the testator intended? The Court assumes that the testator read his will and understood it. It will not, therefore, admit any extraneous evidence of his intention (except, as we have just said, in cases of equivocation). The intention expressed in the will is taken conclusively to be the intention of the testator.

(*a*) *Doe* v. *Hiscocks*, 5 M. & W. 363.
(*b*) *Stringer* v. *Gardiner*, 27 Beav. 35.
(*c*) *In re Ofner*, [1909] 1 Ch. 60.
(*d*) *Lee* v. *Pain*, 4 Hare, at p. 251.
(*e*) *Charter* v. *Charter*, L. R. 7 H. L. 364.

If on reading a will there is any doubt as to the meaning of the testator's language, evidence is always admissible of the circumstances surrounding the testator at the time of making his will (*f*), so as to put the Court "in the shoes of the testator." Thus the Court should be informed as to what property the testator owned at his death, its tenure or other nature, and, where material, the date at which the testator acquired it (*g*).

A familiar illustration of this doctrine is cited from Lord BACON, where a man devises his manor of S. to J. F., and it turns out that he has two manors answering the description, *e.g.*, North S. and South S. In such cases it may be shown by extrinsic evidence which manor was intended to pass (*h*). In a case, where a testatrix by her will bequeathed £4,000 to C. "for the charitable purposes agreed upon between us," the Court of Appeal held that an affidavit by C. was admissible to show what the charitable purposes were, but not to show that only the income of the £4,000 during his life was to be devoted to the charitable purposes, as that would contradict the will (*i*). In another case, a testator had given to his wife all his property for life, and added: "I desire and empower her by her will, or in her lifetime, to dispose of my estate in accordance with my wishes verbally expressed by me to her." JOYCE, J., held that parol evidence was inadmissible to show what those wishes were, and that the clause quoted above was void for uncertainty (*k*). The distinction between these two cases is that the latter was one relating to a power, and the general rule is that extrinsic evidence of a testator's intention is inadmissible to aid the construction

(*f*) *Rayner* v. *Rayner*, [1904] 1 Ch. 176; *In re Gent*, [1905] 1 Ch. 386.
(*g*) *In re Gibbs*, [1907] 1 Ch. 465.
(*h*) *Doe* v. *Needs*, 2 M. & W. 129; *Ricketts* v. *Turquand*, 1 H. L. Cas. 472.
(*i*) *Huxtable* v. *Crawford*, [1902] 2 Ch. 793.
(*k*) *Hetley* v. *Hetley*, [1902] 2 Ch. 866.

of his will (*l*); but where, on the construction of the words of the will, a presumption arises, extrinsic evidence is admissible to rebut such presumption (*m*).

When declarations of a testator are admissible, it is immaterial that they were made some time after the execution of the will (*n*), or before it (*o*), and they are admissible to prove the contents of a lost will (*p*). In *Quick* v. *Quick* (*q*), Lord PENZANCE held that the declarations of a testator made *after* the execution of a lost will, were not admissible to prove its contents. This case was, however, overruled by the majority of the Court of Appeal in *Sugden* v. *St. Leonards*, where it was held that such declarations, written and oral, whether made before or after the execution of the will, are, in the event of its loss, admissible as secondary evidence of its contents, MELLISH, L.J., dissenting as regards declarations made after execution. A similar question was under consideration in the House of Lords in *Woodward* v. *Goulstone* (*r*), but was not decided. The learned lords present took the very inconvenient course of saying that, under the circumstances of that case, the question did not arise for determination, but that they desired to leave the question open, should it thereafter come before the House for decision; and the Lord Chancellor in his judgment expressed considerable doubts as to the correctness of the decision of the majority of the judges of the Court of Appeal in *Sugden* v. *St. Leonards*. The result is, that the decision of the Court of Appeal stands, and is binding on inferior Courts, in spite of the cloud cast over it by the House of Lords. But it has been held that this case does not alter the

(*l*) *Doe* v. *Hiscocks*, 5 M. & W. 363; cf. *Stanley* v. *Stanley*, 2 J. & H. 491; *Bishop* v. *Holt*, [1900] 2 Ch. 620.
(*m*) *Tussaud* v. *Tussaud*, 9 Ch. D. 363.
(*n*) *Doe* v. *Allen*, 12 A. & E. 455.
(*o*) *Langham* v. *Sandford*, 19 Ves. 649.
(*p*) *Sugden* v. *Lord St. Leonards*, 1 P. D. 154; *Gould* v. *Lakes*, 6 P. D. 1.
(*q*) 3 Sw. & Tr. 442.
(*r*) 11 App. Cas. 469.

old rule that the fact of the execution of a will cannot be proved by the declarations of the testator (*s*).

Where a will has been torn up without the authority of the testator and subsequently pieced together, but certain fragments are missing, so that there are gaps in the document, the Court will not order the missing words to be inserted in the probate, but if secondary evidence is produced which satisfies the Court what the missing words were, it will allow a document setting them out to be annexed to the probate (*t*).

Verbal statements made by a testator, in and about the making of his will, when accompanying acts done by him in relation to that subject, have been held admissible in evidence (*u*). A letter written to a testator by a solicitor, whether by way of advice or statement, is inadmissible for the purpose of construction of the will (*x*).

A witness cannot be asked what a testator said about property, not distinctly devised, in order to show it was intended to pass with other property devised (*y*). Where the testator was in the habit of calling persons by nicknames or wrong names, and these names appear in his will, they can only be explained and construed by the aid of evidence to show the sense in which he used them, just as if his will was written in cipher or in a foreign language (*z*). Thus, a bequest to "Mrs. G." was upheld by evidence that the testator was in the habit of calling a Mrs. Gregg, "Mrs. G." (*a*). Here the evidence was of a fact, not of a declaration. So, parol evidence is admissible to fill a partial blank (*b*), or to show what lands of the testator were reputed to lie in a parish, in

(*s*) *Atkinson* v. *Morris*, [1897] P. 40.
(*t*) *Gill* v. *Gill*, [1909] P. 157.
(*u*) *Johnson* v. *Lyford*, L. R. 1 P. & D. 546.
(*x*) *Per* JAMES, L.J., in *Wilson* v. *O'Leary*, L. R. 7 Ch., at p. 456.
(*y*) *Doe* v. *Hubbard*, 15 Q. B. 228.
(*z*) *Per* Lord ABINGER in *Doe* v. *Hiscocks*, 5 M. & W. 368.
(*a*) *Abbott* v. *Morice*, 3 Ves. 148; cf. *Lee* v. *Pain*, 4 Hare, at p. 251.
(*b*) *In the Estate of Hubbuck*, [1905] P. 129; *Mourmand* v. *Le Clair*, [1903] 2 K. B. 216.

order to construe a devise of lands in the parish (*c*); but where the testatrix, after a specific devise to "my niece, A. B." (who was in fact her husband's niece), left her residue to "all my nephews and nieces," JESSEL, M.R., refused to admit A. B. to participate in the residue (*d*). Where the testator appointed his "nephew A. B." executor, and his own nephew and his wife's nephew both bore that name, extrinsic evidence was admitted to show that the latter was the person designated (*e*). But where a testator left a legacy to his "niece E. W.," and neither he nor his wife had any niece, but his wife had a legitimate grandniece, E. W., and an illegitimate grandniece, E. W., evidence to show that the testator intended the latter was rejected on the ground that, under the circumstances, there was no latent ambiguity as there would have been had both been legitimate (*f*). To identify the person or thing intended as the object or subject of the testator's bounty the Court may inquire into every material fact, and all extrinsic circumstances known to the testator as to his family and affairs; but extrinsic evidence of the testator's intention is admissible only in the event of there being more than one person or thing answering equally well to the description he has used (*g*). In cases such as those under consideration the testator's own declarations are probably inadmissible (*h*). Punctuation in a will must be disregarded (*i*).

A will may refer to another document in such a manner as to incorporate it; but for this purpose the other document must be clearly identified by the will and must be in existence at the time the will is executed. If it is not clear from the words of the will whether the

(*c*) *Anstee* v. *Nelms*, 1 H. & N. 225; *In re Glassington*, *Glassington* v. *Follett*, [1906] 2 Ch. 305.
(*d*) *Wells* v. *Wells*, L. R. 18 Eq. 504.
(*e*) *Grant* v. *Grant*, L. R. 5 C. P. 727.
(*f*) *Ingham* v. *Rayner*, [1894] 2 Ch. 85.
(*g*) *Charter* v. *Charter*, L. R. 7 H. L. 364.
(*h*) *Per* Sir F. H. JEUNE in *In the Goods of Chappell*, [1894] P. 98.
(*i*) *Per* Lord WESTBURY in *Gordon* v. *Gordon*, L. R. 5 H. L., at p. 276.

document to which it refers is then in existence or will come into existence at some future time, no parol evidence is admissible to incorporate any document (*k*). As Lord ELDON said in *Smart* v. *Prujean* (*l*):—

> "The rule of law is that an instrument properly attested, in order to incorporate another instrument not attested, must describe it so as to be a manifestation of what the paper is, which is meant to be incorporated, in such a way that the Court can be under no mistake."

And Lord KINGSDOWN, in *Allen* v. *Maddock* (*m*), said:—

> "A reference in a will may be in such terms as to exclude parol evidence, as where it is to papers not yet written or where the description is so vague as to be incapable of being applied to any instrument in particular."

It is impossible in this volume to give more than a mere outline of the special rules which have from time to time been laid down in our Courts of Equity for the true interpretation of particular clauses in a will. The decisions on such points in our law reports are very numerous, and not always consistent. The reader is referred to the well-known works of Messrs. Vaughan Hawkins and Theobald. The rules as to the construction of wills and deeds differ in one important particular. If a deed contains two clauses which are so clearly inconsistent with each other that they cannot be reconciled, the former clause will prevail. In a will, however, the latter clause will prevail; it is supposed to represent the testator's latest intention.

We may also mention three other rules applicable to the construction of a deed; if the recitals are clear and the operative part is ambiguous, the recitals govern the construction (*n*); if the recitals

(*k*) *University College of North Wales* v. *Taylor*, [1908] P. 140.
(*l*) 6 Ves., at p. 565.
(*m*) 11 Moo. P. C., at p. 454.
(*n*) See *ante*, pp. 487, 488.

are ambiguous and the operative part is clear, the operative part must prevail; if both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred (*o*).

Again, in a lease the *habendum* is the operative clause, and will decide the length of a term in preference to the *reddendum*, should these two clauses differ. For example, if the *habendum* of a lease says one hundred years and the *reddendum* says ninety-four years, the term will be held to be for one hundred years; and if there be any discrepancy between a lease and its counterpart, the lease will prevail over the counterpart.

A curious problem on this point came before the Common Pleas Division in the case of *Burchell* v. *Clark* (*p*). There the lease stated the length of the term in the *habendum* as ninety-six years, in the *reddendum* as ninety-nine years, while the counterpart had ninety-nine throughout; and it was held that the demise was for a term of ninety-nine years.

Grants and Contracts.

The construction of documents is for the judge, though the jury will find any facts which may be necessary to enable the judge to construe the document. A copy of the document to be construed should be supplied to the Court, and the costs of such copy will be allowed on taxation (*q*). When a document purports to be the record of the final intention and agreement of the contracting parties, no parol evidence, as we have seen (*r*),

(*o*) *Ex parte Dawes*, 17 Q. B. D., at p. 286.
(*p*) 2 C. P. D. 88; and see *Matthews* v. *Smallwood*, [1910] 1 K. B. 777.
(*q*) *Re Houston*, 89 L. T. 469.
(*r*) See *ante*, p. 156.

is admissible to contradict or vary its terms. Parol evidence is only admissible:—

(a) *To show* that the alleged contract is no contract at all, owing either to—

(1) Incapacity of the parties.
(2) Illegality of the consideration.
(3) Non-compliance with a statute which requires some special form.
(4) The parties not being *ad idem*.
(5) The presence of fraud, mistake, or misrepresentation.
(6) The non-fulfilment of some condition precedent.
(7) The rescission of the contract.

Although parol evidence may not be given to vary, contradict, add to or subtract from any contract contained in a document, it may be given to show that the document is no contract at all, or to prove collateral contracts between the same parties on the same subject-matter, which do vary, contradict, add to or subtract from the contract contained in the document.

(b) *To explain*—

(1) Foreign or technical terms used in the documents and terms used in a sense peculiar to a locality, or to a particular trade; or
(2) Latent as distinct from patent ambiguities.

These distinctions have already been discussed (*s*). Apart from these cases, the construction of contracts follows the general rules which have already been laid down for other documents, and especially the fundamental rule that the parties must be taken to have intended what they have written. The judge will always begin by studying the language of the document before him. It is only if such study fails that he will seek for an interpretation outside the four corners of the document.

In a recent case a question arose as to the interpretation to be put upon certain clauses in a mining lease, and it was held that in construing instru-

(*s*) See *ante*, pp. 479, 485.

ments which involve the severance of surface or of a higher seam and subjacent minerals, it is presumed that the owner of the surface or of the higher seam intends to reserve his common law right of support; the *onus* of showing that this was not the intention of the parties to the deed lies on the mineral owner, and this *onus* is not discharged by the insertion in the lease of full powers of working and carrying away all the minerals, expressed in general terms, or of wide provisions for compensation. But when the mineral owner proves not only that the upper seam will not be destroyed, but only injured to such an extent as will admit of compensation, and, further, that it is impossible to get the minerals at all without letting down the upper seam, all reasons for qualifying the general words of the powers of working are gone, and if the terms of the instrument make it clear that it was the intention of the parties that subjacent seams should be worked, it is a necessary implication that they intended that there should be a subsidence of superjacent strata (*t*).

Indictments.

In former times, when nearly every felony was a capital offence, indictments were always construed *in favorem vitæ;* and resort was had to many technicalities in order to save the life of a first offender. The degree of precision required in the statement of the crime was curiously minute; one prisoner, for instance, escaped punishment because the colour of the horse which he had stolen was misstated in the indictment; and another who had stolen a pair of boots was acquitted, because in the indictment the property had been described as a pair of shoes. It was laid down that an indictment ought to be construed against the prosecutor who preferred it. But in the present days of greater leniency this rule has

(*t*) *Butterley Co., Ltd.* v. *New Hucknall Colliery Co., Ltd.*, [1910] A. C. 381; and see *G. W. Rail. Co. and Midland Rail. Co.* v. *Bristol Corporation*, 87 L. J. Ch. 414.

been abandoned, and the language of indictments has been greatly simplified by the Indictments Act, 1915 (*u*). The offence charged must now be stated "shortly in ordinary language, avoiding as far as possible the use of technical terms" (*x*). "Words of art" should be omitted; the Court has increased powers of amendment.

Statutes.

It might have been expected that the interpretation of a statute would be an easier task than the interpretation of a mercantile contract, or of a deed or lease. But in practice this is found not to be the case. The pressure necessary to secure the passing of a Bill through Parliament often induces the Government to accept amendments which are not in entire harmony with either the object or the language of the statute. It has been found necessary, therefore, to lay down certain canons for the construction of statutes. The object of these is to ascertain the intention of the Legislature—not to control that intention, or to confine it within limits which the judges may deem reasonable or expedient. The leading rules may be briefly stated thus :—

(i.) A statute must be taken to mean what it says (*y*). The intention of the Legislature must be gathered from the language which it has employed in the Act, and not from any extraneous source, such as statements made during the debates in either House, or conjectures as to the policy of the promoters of the Bill.

(*u*) 5 & 6 Geo. V. c. 90.
(*x*) Rule 4 (3).
(*y*) See the judgment of Lord ESHER, M.R., in *Hornsey Local Board* v. *Monarch, etc., Society*, 24 Q. B. D., at p. 5; and *Algoma Central Rail. Co.* v. *R.*, [1903] A. C. 478; *Sharpness New Docks* v. *Att.-Gen.*, [1915] A. C. 654; *MacConnell* v. *Prill & Co.*, [1916] 2 Ch. 57.

Under our constitution the office of declaring the law is separated from that of making it. It is not the province of a judge to speculate upon what in his opinion may be most for the advantage of the community; it is his duty simply to construe what Parliament has said. "It is dangerous in the construction of a statute to proceed upon conjecture" (*z*). "We cannot speculate upon the intentions of the Legislature which are neither expressed in terms nor conveyed by implication; our duty is to interpret the words of a statute according to their plain and grammatical meaning, when, as in this case, they are not controlled by anything to be found in the context" (*a*). "It is never very safe ground in the construction of a statute to give weight to views of its policy which are themselves open to doubt and controversy" (*b*).

(ii.) If the words of the statute be plain and clear, it is not for the Court to raise any doubts as to what they mean. "We cannot assume a mistake in an Act of Parliament" (*c*). This is so, though "anomalous and inconvenient" results may follow (*d*).

"If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such a case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting the

(*z*) *Per cur.* in *Barton* v. *Muir*, L. R. 6 P. C., at p. 144; and see *South Eastern Rail. Co.* v. *Railway Commissioners*, 50 L. J. Q. B., at p. 203.

(*a*) *Per cur.* in *Muller* v. *Baldwin*, L. R. 9 Q. B., at p. 461; and see the judgment of Lord HALDANE, L.C., in *Vacher & Sons* v. *London Society of Compositors*, [1913] A. C., at p. 113.

(*b*) *Per* Lord SELBORNE, L.C., in *Municipal Building Society* v. *Kent*, 9 App. Cas., at p. 273.

(*c*) *Per* GROVE, J., in *Richards* v. *McBride*, 8 Q. B. D., at p. 122.

(*d*) See *Clementson* v. *Mason*, L. R. 10 C. P. 209, 217

intention to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer (*e*), is 'a key to open the minds of the makers of the Act and the mischief which they intended to redress'" (*f*).

(iii.) If the language of a statute is ambiguous or if one clause in it contradicts another, still the statute must be construed as a whole, and some meaning, if possible, given to every part of it. "When two constructions are open, the Court may adopt the more reasonable of the two" (*g*). A construction which renders any clause or proviso nugatory or meaningless will be avoided (*h*). For this purpose, if it be absolutely necessary, a word or two may be rejected, but none may be added (*i*). And that construction will be the best, which gives to all the words their plain and ordinary meaning. "Even in cases where words are ambiguous and capable of two constructions, the rule is to adopt that which would give some effect to the words rather than that which would give none" (*j*).

(*e*) *Stowel* v. *Lord Zouch*, Plowd., at p. 369.

(*f*) *Per cur.* in *Sussex Peerage Case*, 11 Cl. & F., at p. 143; and see *Abley* v. *Dale*, 11 C. B., at p. 390; *Fielding* v. *Morley Corporation*, [1899] 1 Ch. 1. As to cross-headings in a statute, see *Union Steamship Co., etc.* v. *Melbourne, etc., Commissioners*, 9 App. Cas., at p. 369. As to the preamble, see *R.* v. *Costello*, [1910] 1 K. B. 28.

(*g*) *Per* Lord BLACKBURN in *Countess of Rothes* v. *Kirkcaldy, etc., Commissioners*, 7 App. Cas., at p. 702; and see the remarks of JESSEL, M.R., in *The Alina*, 5 Ex. D., at pp. 230, 231; and of Lord SELBORNE in *Caledonian Rail. Co.* v. *North British Rail. Co.*, 6 App. Cas., at p. 122.

(*h*) See the judgments of GROVE, J., in *Ruther* v. *Harris*, 1 Ex. D., at pp. 99, 100, and in *Williams* v. *Evans*, *ibid.*, at pp. 281, 282.

(*i*) *Laird* v. *Briggs*, 19 Ch. D. 22; *Symons* v. *Leaker*, 15 Q. B. D. 629; *Salmon* v. *Duncombe*, 11 App. Cas., at p. 635; *R.* v. *Vasey and Lally*, 93 L. T. 671.

(*j*) *Cargo ex* "*Argos*," L. R. 5 P. C., at p. 153; and see the remarks of Lord COLERIDGE, C.J., in *R.* v. *Most*, 7 Q. B. D., at p. 251; and of Lord ESHER, M.R., in *Barlow* v. *Ross*, 24 Q. B. D., at pp. 388, 389.

Thus, by the Tyne Coal Dues Act, 1872 (*k*), the old coal dues were abolished, and the commissioners were empowered to levy dues, *inter alia*, of one penny per ton on "coals exported from the port." The question raised in the case of *Muller* v. *Baldwin* (*l*) was whether these words rendered coals taken out of the port of Newcastle by a foreign steamer for consumption during the voyage liable to this due of one penny per ton. Under the former Act the usage had been not to levy this due upon such bunker coal, but only upon coal which was exported for the purpose of being sold in foreign countries. It was held that, in the absence of anything in the Act to the contrary, the phrase "exported from the port" must be taken to be used in its ordinary meaning of "carried out of the port," and that, therefore, the due must be paid for every ton of coal "carried out of the port" on board the steamer.

So, by the County Courts Admiralty Jurisdiction Acts, 1868 and 1869 (*m*), jurisdiction in Admiralty matters was conferred on such county courts as might be appointed by the Lord Chancellor. The latter Act enacted that any Courts so appointed "shall have jurisdiction . . . to try and determine any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of any goods in any ship, provided the amount claimed does not exceed £300" (*n*). And it has been held (*o*) that this section gives such county courts jurisdiction in cases of claims arising out of charter-parties or other agreements for the use or hire of ships; and this although

(a) the Court of Admiralty has no original jurisdiction in such cases;

(b) the county courts had at that time no jurisdiction

(*k*) 35 & 36 Vict. c. xiii.
(*l*) L. R. 9 Q. B. 457.
(*m*) 31 & 32 Vict. c. 71; 32 & 33 Vict. c. 51.
(*n*) 32 & 33 Vict. c. 51, s. 2.
(*o*) *Cargo ex "Argos,"* L. R. 5 P. C. 134; and see *R.* v. *Judge of the City of London Court*, [1892] 1 Q. B. 273.

to try claims arising out of contracts which exceeded £50;

(c) the appeal from the decision of the Court so appointed would lie to the Court of Admiralty, which had no jurisdiction over contracts; and

(d) the Admiralty procedure *in rem* was thus for the first time rendered available in an ordinary mercantile action of contract.

(iv.) A statute comes into operation at the date when it receives the royal assent, unless some other date is expressly mentioned therein; it must be construed as prospective, and not as retrospective, in its operation, unless it relates to procedure only, or unless a contrary intention be clearly expressed (*p*). A man's rights depend upon the state of the law at the time when his cause of action vested in him, his remedies on the state of the law when he seeks to enforce his rights. "No suitor has a vested interest in the course of procedure" (*q*).

Thus, an Act (*r*), passed in August, 1881, to compel public-houses in Wales to close on Sunday, was to come into operation in a certain division of a county "on the day next appointed for the holding of the general annual licensing meeting for that division," and the general annual licensing meeting for that division was held on September 8th, 1881. The Court decided that the Act was not in operation on the following Sunday, on the ground that "the day next appointed" meant "the

(*p*) *Gardner* v. *Lucas*, 3 App. Cas. 582; see the judgments at pp. 597, 601, 603. And see *Smithies* v. *National Association of Operative Plasterers*, [1909] 1 K. B. 310; *R.* v. *Smith*, [1910] 1 K. B. 17; cf. *Wooler* v. *N. E. Breweries*, [1910] 1 K. B. 24.

(*q*) *Per* MELLISH, L.J., in *Republic of Costa Rica* v. *Erlanger*, 3 Ch. D., at p. 69.

(*r*) Sunday Closing (Wales) Act, 1881 (44 & 45 Vict. c. 61).

day which shall after the passing of the Act be next appointed" for the holding of such meeting, and not the next day on which such a meeting would be held if it had been appointed before the passing of the Act (*s*).

(v.) If general words in a statute follow particular terms, they will be construed as applying only to persons or things of the same class (*ejusdem generis*) as those already mentioned. Thus a bicycle is not included in the words "coach, chariot, hearse, chaise, gig, car, chair, and every other carriage hung on springs" (*t*).

(vi.) If particular terms only be used and no general words follow, the statute will be construed as not applying to any other persons or things of the same class, but only to those already expressly mentioned. *Expressio unius est exclusio alterius.*

Thus the first great Poor Law Act, passed in 1601 (*u*), imposed rates on "lands, houses, tithes, *coal mines*, or saleable underwoods in the parish"; and it was held that no other mines could be rated. "As there may be a reason for the strict letter of the statute, and none appears for extending it beyond the letter, we have no ground or authority or pretence for giving it that extensive construction" (*x*).

(vii.) If one statute deals generally with a whole class of persons or things, and another statute,

(*s*) *Richards* v. *McBride*, 8 Q. B. D. 119.

(*t*) *Simpson* v. *Teignmouth and Shaldon Bridge Co.*, [1903] 1 K. B. 405; *Smith* v. *Kynnersley*, *ibid.*, 788; *Plymouth, etc., Tramways Co.* v. *General Tolls Co., Ltd.*, 75 L. T. 467; (H. L.) 14 T. L. R. 531; and see *Cannan* v. *Earl of Abingdon*, [1900] 2 Q. B. 66; *Burton* v. *Nicholson*, [1909] 1 K. B. 397.

(*u*) 43 Eliz. c. 2.

(*x*) *Per* Lord MANSFIELD in *Lead Co.* v. *Richardson*, 3 Burr., at p. 1344; and see *R.* v. *Bell*, 7 T. R. at p. 600; *R.* v. *The Inhabitants of Woodland*, 2 East, at p. 164; *R.* v. *Cunningham*, 5 East, 478; *R.* v. *Halkett*, [1910] 1 K. B. 50.

whether earlier or later in date, deals exclusively with a particular species of the persons or things included in that class, the special provision will restrict the general enactment and will control the particular species of persons or things.

Thus, as we have seen above, a general enactment that no County Court can try any action arising out of a contract if the amount claimed exceeds £50 (*y*), must yield to a special provision that certain County Courts can try *any* claim arising out of an agreement for the use or hire of any ship, even if it exceed £50.

Again, by s. 3 of the Fatal Accidents Act, 1846 (*z*), an action for the benefit of the wife, husband, parent, or child of a person whose death has been caused by the wrongful act, neglect, or default of another must be commenced within twelve calendar months of the death of the deceased. By s. 1 of the Public Authorities Protection Act, 1893 (*a*), an action against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or in respect of any alleged neglect or default in the execution of any Act, must be commenced within six months next after the act, neglect, or default complained of, or, in case of continuing injury or damage, within six months next after the ceasing thereof. An action under the Fatal Accidents Act, 1846, was brought against the defendants, a statutory body formed to provide, maintain, and manage a hospital, to recover damages for the death of a patient in the hospital caused by the negligent act of a nurse in the defendants' employment; the writ was issued more than six months, but less than twelve months, after the death of the deceased. Held, that the action was brought too late, and was not maintainable (*b*).

(*y*) The limit is now £100: County Courts Act, 1903 (3 Edw. VII. c. 42), s. 3.

(*z*) 9 & 10 Vict. c. 93.

(*a*) 56 & 57 Vict. c. 61.

(*b*) *Markey and Another* v. *Tolworth, etc., Hospital District Board*, [1900] 2 Q. B. 454.

(viii.) A statute which destroys, infringes or restricts any existing right will be construed strictly. Cases not infrequently occur in which it is necessary for the benefit of the community as a whole to take private property away from its owner. But such an invasion of private right is never sanctioned without due inquiry, and when it is sanctioned compensation should always be granted to the owner of the property taken. A clause to this effect is almost invariably inserted in the Act which legalises the infringement. And, even in the absence of any such clause, "it is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged to so construe it" (*c*).

(ix.) Again, any statute which derogates from the common law will be construed strictly. From very early times the judges, as we have seen, were loth to admit that the common law required amendment; and therefore refused to enforce any statute which altered the common law, unless its terms were so clear and explicit as to be imperative. The same strictness will be applied to the construction of any Act which creates a new criminal offence or imposes any fresh burden on the people. "Acts passed under such circumstances should be construed strictly against the parties obtaining them, but liberally in favour of the public" (*d*).

(*c*) *Per* BRETT, M.R., in *Attorney-General* v. *Horner*, 14 Q. B. D. at p. 257; and see *R.* v. *Smith*, L. R. 1 C. C. R. 266, 271; *Barton* v. *Muir*, L. R. 6 P. C. 134; *Williams* v. *Evans*, 1 Ex. D. 277; *Lamb* v. *Brewster*, 4 Q. B. D. 607; *Cotton* v. *Vogan & Co.*, [1896] A. C. 457.

(*d*) *Per* TINDAL, C.J., in *Parker* v. *Great Western Rail. Co.*, 7 Scott, N. R. at p. 870; and see the remarks of Lord MACNAGHTEN

In addition to these rules the practitioner has also the Interpretation Act, 1889 (*e*), to assist him in construing a statute. This Act has done much to ensure reasonable conciseness in the wording of statutes, besides supplying many useful definitions, such as :—

"Words importing the masculine gender shall include females" (*f*).

"Words in the singular shall include the plural, and words in the plural shall include the singular."

"The expression 'person' shall, unless the contrary intention appears, include a body corporate" (*g*).

"The expression 'oath' and 'affidavit' shall, in the case of persons for the time being allowed by law to affirm or declare instead of swearing, include affirmation and declaration, and the expression 'swear' shall, in the like case, include affirm and declare" (*h*).

in *Metropolitan Water Board* v. *New River Co.*, 20 T. L. R., at pp. 689, 690; cf. *Attorney-General* v. *West Gloucestershire Water Co.*, [1909] 2 Ch. 338, at p. 347.

(*e*) 52 & 53 Vict. c. 63.

(*f*) *Ibid.*, s. 1, sub-s. 1; but see *Chorlton* v. *Lucas*, L. R. 4 C. P. 374.

(*g*) *Ibid.*, s. 2, sub-s. 1.

(*h*) *Ibid.*, s. 3.

BOOK IV.

PROCEDURE.

CHAPTER I.

PROCEDURE IN CRIMINAL CASES.

Witnesses.

It is in theory of law the duty of every good citizen to assist the police and the prosecutor by giving them all relevant information, and calling their attention to any fact which may throw light on the identity of the criminal or the manner in which the crime was committed (*a*). To suppress such information in the case of treason or felony, is technically a crime, which is termed "misprision"; but prosecutions for misprision are extremely rare, if not obsolete. As a matter of fact, however, in serious criminal cases information is often readily afforded to the police. But there is no power, at this stage of the proceedings, of placing such information upon record in any shape which will render it admissible at a subsequent trial.

In cases of homicide, however, there are two exceptions to this statement. First, it is the duty

(*a*) As to the right of the police to interrogate persons whom they suspect of crime, see *ante*, p. 103.

of a coroner to hold an inquest, whenever there is reasonable cause for suspecting that any person has died either a violent or unnatural death, of which the cause is unknown. In order to investigate the cause of death the coroner can, by *subpœna*, compel the attendance of any person whom he believes can throw light upon the matter, and he can also compel such witness by *subpœna duces tecum* to produce any documents in his possession which may be useful to the inquiry. Each witness is examined on oath, and his evidence taken down in writing in the form of a deposition, which can, in certain cases, be given in evidence at the subsequent trial, if—

(i.) it be signed by the coroner;

(ii.) it was taken down in the presence of the person subsequently charged with the crime;

(iii.) such person had an opportunity of cross-examining the witness (*b*).

Frequently, however, the person who is subsequently accused of the crime is not present at the coroner's inquest. If he is, and is called upon to give evidence, he may refuse to answer any question which he swears may tend to criminate himself. Indeed, if the coroner thinks that there is any probability of a witness who is called before him being subsequently tried for the murder or manslaughter of the deceased, he should warn the witness that he need not give evidence unless he wishes to do so.

Secondly, in cases of homicide, a declaration made by a person who is in a dying condition as to the

(*b*) See *ante*, p. 286; and *R.* v. *Black*, 74 J. P. 71.

cause of his being in that condition is admissible on the subsequent trial of any person for causing the death of such person, provided the declaration was made in settled hopeless expectation of death. The existence of this state of mind must be clearly established, as it is this which takes the place of the sanction of an oath. It is not necessary that the accused should have been present at the time the declaration was made (*c*).

As soon, however, as any person is definitely charged with the commission of a crime and either summoned to appear before a justice of the peace or arrested under a warrant, there is a clear power to compel anyone who possesses relevant knowledge to attend and give evidence at the preliminary hearing (*d*). This may be done by serving on such person a witness summons, which he must obey under pain of attachment.

A person who is summoned to give evidence before a Court of petty sessions is not entitled to disobey the summons on the ground that he asked for, but was not paid, his expenses (*e*), although this fact would probably be deemed by the Court a sufficient excuse if the witness could show that he was too poor to attend the Court at his own expense. If he does not attend on being thus summoned, the justice can compel his attendance by issuing a warrant, and he will do so if he has reason to believe that his evidence will be of any value. When brought before the justice he can be compelled to give evidence, unless he swears that to do so would tend to criminate him. But the accused person cannot be compelled to give evidence, nor can his wife or her

(*c*) See *ante*, p. 70.
(*d*) *Evans* v. *Rees*, 12 A. & E. 55.
(*e*) *R.* v. *Cook*, 1 C. & P. 321 ; 2 Hawk c. 46, s. 173.

husband without the consent of the accused (*f*). The accused person must be present whenever evidence is given against him and must be allowed the opportunity of cross-examining the witness.

The evidence of each witness is then taken down by the justice's clerk in the shape of a deposition, which is subsequently read over to the witness, who thus has the opportunity of correcting it in any particular. This the witness signs, and thus makes it evidence against himself. Should the justice decide to commit the prisoner for trial, he can bind over the witnesses to appear at the trial and give evidence. If a witness persists in refusing to attend the trial after the matter has been fully explained to him, he can be imprisoned till the trial and taken to the Court against his will and compelled to give evidence (*g*).

This power of placing on record the evidence of witnesses given shortly after the events have occurred is extremely valuable; for the depositions (*h*)—

(i.) inform the prisoner as to the precise case he has to meet;

(ii.) enable the indictment to be drafted;

(iii.) enable the judge to decide whether a defence has been disclosed within the Poor Prisoners' Defence Act, 1903;

(iv.) serve as a check to the evidence of any witness who varies from his deposition at the trial; and

(v.) can be read if the witness is dead, too ill to travel, or kept away by the other side.

The procedure as to these depositions is regulated by the Indictable Offences Act, 1848, and other statutes. These have been already dealt with in the chapter on Secondary Oral Evidence (*i*).

(*f*) This does not, of course, apply where one spouse prosecutes the other for an offence triable summarily, *e.g.*, for assault. For the exceptions in cases of indictable offences, see *ante*, pp. 184, 185.

(*g*) *Bennet and Wife* v. *Watson and Another*, 3 M. & S. 1.

(*h*) The prosecution is entitled to a copy at a cost of 4*d.* per folio of seventy-two words, the defence at 1½*d.* per folio of ninety words, or, if legal aid is granted under the Poor Prisoners' Defence Act, 1903, gratuitously.

(*i*) See *ante*, pp. 281–291. For the attendance of witnesses before a Court of Summary Jurisdiction, see Summary Jurisdiction Act, 1848

If it is desired to call at the trial, either to give evidence or to produce a document, a person who was not bound over by the magistrate or coroner, he can be *subpœnaed* to attend. If he resides within the county where the trial is to take place, the clerk of assize (for Assizes) or the clerk of the peace (for Quarter Sessions) can issue a *subpœna*. A Crown Office *subpœna* must be obtained if the person resides outside the county; such a *subpœna* will bind him in whatever part of England or Wales he resides. The prisoner also can *subpœna* further witnesses (*k*); those whom he has called before the justices will have been bound over to appear at the trial in the same way as the witnesses for the prosecution. Moreover, any person, who is actually in Court during the trial, must if required by the judge go into the box and give evidence, even though he has not been *subpœnaed* (*l*). The expenses of all witnesses for the prosecution or defence, whether bound over or *subpœnaed*, will be paid out of the County Fund (*m*) unless they are disallowed by the judge at the trial. The King's Bench Division has an inherent jurisdiction to set aside any *subpœna* which has not been issued for the *bonâ fide* purpose of securing the attendance of a witness (*n*).

If the prosecution intends to call any witnesses whose evidence was not taken before the justice, notice of such intention and a short statement of their evidence should be served on the prisoner in sufficient time before the trial to enable him to prepare his defence accordingly. The prisoner is not entitled to this notice as of right, but if he is likely to be prejudiced by the omission to give it, the Court will adjourn the trial (*o*).

(11 & 12 Vict. c. 43), as explained by the Summary Jurisdiction Act, 1849 (12 & 13 Vict. c. 103), s. 9; see also Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49).

(*k*) 1 Anne, st. 2, c. 9, s. 3.

(*l*) *R.* v. *Sadler*, 4 C. & P. 218.

(*m*) 30 & 31 Vict. c. 35, ss. 3, 5.

(*n*) *R.* v. *Baines*, [1909] 1 K. B. 258.

(*o*) See *R.* v. *Jackson*, 14 Cr. App. R. 41, where the case was adjourned, after the defence was closed, for the attendance of witnesses for the prosecution.

Documents and Things.

The police have no general power to search for evidence in the house either of a suspected person or of a third person; they have no general power to examine or seize the books, papers, or other property of the accused. Not even a Secretary of State can issue a general warrant authorising the police to seize all the papers of a person who is suspected of high treason or, indeed, of any other offence (*p*). But when arresting a person for a felony or misdemeanour, the police have power at the same time to seize any instrument, document, or thing believed to have been used by the accused for the purpose of committing the offence, in order to produce them as evidence against him at his trial, such as a knife, a bloodstained garment, or a forged document; and they may take such things by force provided they use no unnecessary violence (*q*).

A wider power, however, exists in the case of stolen property:—

(i.) A justice of the peace can issue a search warrant, authorising certain persons to enter a building to search for stolen goods, and to seize them if found. Such a warrant is only granted on the sworn information of the owner to the effect that his property has been stolen, and that he believes that it is in the place which he wishes to have searched. The persons authorised to search, the building to be searched, and the goods for which search is to be made, must all be named or described in the warrant. The officer must take the warrant with him; he should also take with him a person who can identify the

(*p*) *Wilkes* v. *Wood*, 19 How. St. Tr. 1153; *Entick* v. *Carrington*, 19 How. St. Tr. 1030.

(*q*) *Dillon* v. *O'Brien*, 16 Cox, 245.

stolen property. He should demand admission before exercising his right to enter by force. At common law a search warrant could only be issued in cases of larceny, but now by s. 42 (1) of the Larceny Act, 1916 (*r*), this power is extended to cases in which any property has been obtained by embezzlement, robbery, false pretences, or any other crime punishable under that Act; and also by 44 & 45 Vict. c. 69, s. 24, to fugitive offenders from the colonies.

(ii.) Under s. 42 (2) of the Larceny Act, 1916 (*r*), any chief officer of police may give authority in writing to any police constable to enter any house, shop, yard, or other premises, and to search for and seize any property which he believes to have been stolen, when the premises to be searched—

(a) are, or within the preceding twelve months have been, in the occupation of any person who has been convicted of receiving stolen property or of harbouring thieves; or

(b) are in the occupation of any person who has been convicted of any offence involving fraud or dishonesty, and punishable by penal servitude or imprisonment. It is not necessary for the chief officer to specify any particular property in the authority; he may authorise a search if he has reason to believe generally that the premises are being made a receptacle for stolen goods.

Similar powers of search are given by the Official Secrets Act, 1911 (*s*), s. 9; the Forgery Act, 1913 (*t*), s. 16; and other statutes.

The police may also be authorised — outside the metropolis by special warrant of justices (*u*), within the metropolis by a written order signed by a commissioner of police (*x*)—to enter, by force if necessary, any place suspected of being kept or used as a common gaming

(*r*) 6 & 7 Geo. V. c. 50.
(*s*) 1 & 2 Geo. V. c. 28.
(*t*) 3 & 4 Geo. V. c. 27.
(*u*) 8 & 9 Vict. c. 109, s. 3.
(*x*) *Ibid.*, s. 6.

house, with the object of arresting all persons found therein. The warrant or order also authorises them to search the persons arrested and to seize all gaming instruments (*y*).

A warrant may also be granted authorising police constables to search for and remove to and detain in a place of safety any woman or girl as to whom there is reasonable cause to suspect that she is unlawfully detained for immoral purposes. Such a warrant can only be issued on the sworn information of a parent, relative or guardian of the woman or girl, or of some person who in the opinion of the justice is *bonâ fide* acting in her interest. The procedure, which is regulated by s. 10 of the Criminal Law Amendment Act, 1885 (*z*), is alternative to the remedy by *habeas corpus*.

If a judge, in the course of any trial before him, comes to the conclusion that one or more of the witnesses is committing perjury, he may order all relevant documents and things in Court to be impounded with a view to their being used in a subsequent prosecution.

The power to *subpœna* a witness also includes the power to order him to bring with him any document or thing which is admissible as evidence in the case (*a*).

The Trial of an Indictment.

As soon as a prisoner has been arraigned and pleaded "Not guilty," and the jury which is to try him has been sworn, counsel for the prosecution opens the case for the Crown. If no one appears to prosecute him, the prisoner will be discharged, for he "stands upon his deliverance." The prosecution always begins in a criminal case; for the prisoner is presumed innocent until he is found guilty.

(*y*) 8 & 9 Vict. c. 109, s. 7.
(*z*) 48 & 49 Vict. c. 69.
(*a*) *R.* v. *Daye*, [1908] 2 K. B. 333.

The opening speech of the counsel for the prosecution should state clearly, concisely, and in chronological order, the facts upon which he relies as establishing the guilt of the accused. He must not open any fact which he is not prepared with evidence to prove; and he should at this stage of the proceedings abstain from all denunciation or invective against the accused, whose guilt has not yet been established (*b*). The witnesses are then called, examined, cross-examined, and, if necessary, re-examined. The counsel for the prosecution also can, and usually does, read to the jury the prisoner's statement made before the justices, whether it tells in favour of the prisoner or not, and whether the prisoner is going to give evidence before the jury or not (*c*).

In certain cases it is necessary to show that the indictment has been preferred with the consent of the Attorney-General or of the Public Prosecutor. This is usually proved by producing his consent in writing. The Court will take judicial notice of the signature of the Attorney-General, but not, apparently, of that of the Public Prosecutor (*d*). This must be proved in the same way as the handwriting of any private individual.

If, at the close of the case for the prosecution, the judge is of opinion that there is no evidence to go to the jury, he ought to direct the jury to acquit the prisoner. He is not bound to do so, unless asked; and, if the prisoner is represented by counsel, he will usually not do so unless the counsel makes an application to that effect (*e*). Where the application is made and rejected,

(*b*) See *R.* v. *Banks*, [1916] 2 K. B. 621.
(*c*) *R.* v. *Bird*, 79 L. T. 359.
(*d*) *R.* v. *Turner*, [1910] 1 K. B. 346; but see *R.* v. *Waller*, *ibid.*, 364.
(*e*) *R.* v. *George* (1908), 1 Cr. App. R. 168; *R.* v. *Leach* (1909), 2 Cr. App. R. 72.

the Court of Criminal Appeal will not consider whether or not the rejection was right, if the defence took any part in the subsequent proceedings; they will look at the whole case, including the cross-examination of the prisoner (*f*).

When the case for the prosecution is closed, the counsel for the prisoner—or the prisoner himself, if undefended by counsel—if he intends to call witnesses, will open his case. Besides such openings there are two other kinds of speeches which a counsel may make. In some cases he may "sum up his own evidence"; in other cases he may make "a general reply"; that is, a speech in which he not only sums up his own evidence, but also deals with the evidence called against him and answers the arguments of his opponent.

It is only where the prisoner is defended by counsel that counsel for the prosecution has a right to sum up his case (*g*). It is only where the prisoner calls witnesses, other than himself, who speak to the facts of the case and not merely as to the prisoner's character, that the prosecuting counsel has a right to reply (unless he be the Attorney- or Solicitor-General, both of whom have the right of reply in all cases, though they do not always exercise it) (*h*).

By the Criminal Evidence Act, 1898 (*i*), the accused, whether charged solely or jointly with another, is a competent witness for the defence before the justices and

(*f*) *R.* v. *Power*, 14 Cr. App. R. 17.
(*g*) 28 Vict. c. 18, s. 2.
(*h*) In Ireland, every counsel for the prosecution has the right of reply.
(*i*) 61 & 62 Vict. c. 36. This Act does not apply to Ireland.

before the petty jury. He cannot, however, be called as a witness except on his own application. It is the duty of the judge to inform him of his right to give evidence (*k*). If he prefers not to give evidence, counsel for the prosecution may not, but the judge in his summing up may, if he thinks fit, comment on the prisoner's omission so to do (*l*). The accused may, if he prefers, remain in the dock and make therefrom an unsworn statement to the jury (*m*). But if he elects to give evidence, he must go into the witness-box (unless the Court otherwise orders) and take an oath like any other witness; and then he is liable to be cross-examined by the counsel for the prosecution. If two persons are jointly indicted, and one of them gives evidence, and, in doing so, incriminates that other, such other is also entitled to cross-examine him (*n*).

The accused may not be asked, and, if asked, cannot be required to answer, any question tending to show (i.) that he has committed, or (ii.) that he has been convicted of, or (iii.) that he has been charged with, any offence other than that with which he stands charged, or (iv.) that he is of bad character. He will, however, lose this protection—

(a) if evidence that he has committed or been convicted of such other offence is admissible as part of the case for the prosecution to show that he is guilty of the offence wherewith he is charged, *e.g.*, in cases of coining, arson, false pretences, etc.; or

(b) if he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his own good character; or

(c) if the nature and conduct of the defence is such

(*k*) *R.* v. *Tate*, [1908] 2 K. B. 680.

(*l*) *R.* v. *Rhodes*, [1899] 1 Q. B. 77; *R.* v. *Smith* (No. 1), 84 L. J. K. B. 2153.

(*m*) S. 18 of the Indictable Offences Act, 1848, is not affected by the Act of 1898.

(*n*) *R.* v. *Hadwen and Ingham*, [1902] 1 K. B. 882; *R.* v. *Paul and McFarlane*, [1920] 2 K. B. 183.

as to involve imputations on the character of the prosecutor (*o*), or of the witnesses for the prosecution; or

(d) if he has given evidence against any other person charged with the same offence (*p*).

Where the accused person is the only witness called by the defence as to the facts of the case, he must be called immediately after the close of the evidence for the prosecution. The fact that he has given evidence does not confer on the prosecution the right of reply (*q*); but the counsel for the prosecution has the right to comment on the prisoner's evidence (*r*). The wife of the accused person can now give evidence for him if he wishes her so to do. She cannot give evidence against him, nor for him except on his own application. To this rule, however, there are exceptions which have been already discussed (*s*). But if the prisoner calls his wife or any other witness as to the facts of the case, the counsel for the prosecution will be entitled to the last word. What has been said above of the wife of a male prisoner applies in all respects to the husband of a female prisoner.

If the prisoner only calls witnesses as to his character this will not give the counsel for the prosecution the right to reply; he has the right to cross-examine such witnesses, but it is not usual for him to do so.

It is necessary to deal in some detail with the order of the speeches, etc., in criminal proceedings up to the time when the judge sums up. There are four cases to be dealt with:—

I. *Where the prisoner is not defended by counsel, and calls no witness to the facts except himself.*

1. Counsel for the prosecution opens his case.
2. Witnesses for the prosecution.

(*o*) See *R.* v. *Biggin*, [1920] 1 K. B. 213.
(*p*) 61 & 62 Vict. c. 36, s. 1 (f); see *ante*, p. 177.
(*q*) *Ibid.*, s. 3.
(*r*) *R.* v. *Gardner*, [1899] 1 Q. B. 150.
(*s*) See *ante*, pp. 184, 185.

3. Prisoner's statement before the magistrates.
4. Prisoner gives evidence, if he wishes.
5. Prisoner makes a speech in his defence.
6. Witnesses as to prisoner's character.

II. *Where the prisoner is not defended by counsel, but calls witnesses as to the facts, in addition to giving evidence himself.*

1. Counsel for the prosecution opens his case.
2. Witnesses for the prosecution.
3. Prisoner's statement before the magistrates.
4. Prisoner opens his case (*t*).
5. Prisoner calls his witnesses, including himself, if he wishes, and witnesses to character, if any.
6. Prisoner sums up his case.
7. Counsel for the prosecution replies on the whole case.

III. *Where the prisoner is defended by counsel, who calls no witness to the facts except the prisoner.*

1. Counsel for the prosecution opens his case.
2. Witnesses for the prosecution.
3. Prisoner's statement before the magistrates.
4. Prisoner gives evidence, if he wishes.
5. Witnesses to character.
6. Counsel for the prosecution sums up his case.
7. Prisoner's counsel speaks in his defence.

IV. *Where the prisoner is defended by counsel, who calls other persons besides the prisoner to give evidence as to the facts.*

1. Counsel for the prosecution opens his case.
2. Witnesses for the prosecution.
3. Prisoner's statement before the magistrates.
4. Prisoner's counsel opens the defence.

(*t*) In actual practice the prisoner usually goes straight into the witness-box and tells his story on oath; but he is entitled to make a speech from the dock before giving his evidence.

5. Witnesses for defence, including, if counsel thinks fit, the prisoner and witnesses to his character.

6. Prisoner's counsel sums up the case for the defence.

7. Counsel for the prosecution replies on the whole case.

Functions of Judge and Jury.

Every indictment is tried by a jury. The presiding judge, as a general rule, decides all questions of law, the jury all questions of fact. It is the duty of the judge to exclude all evidence that is irrelevant, and therefore inadmissible. It is also his duty to see that each relevant fact is proved in a legitimate way; he must therefore decide all objections which are taken to any proposed method of proving a relevant fact (*u*). Thus, it will be for the judge to decide whether a dying declaration is admissible in evidence, or whether a question asked in chief is leading or not.

But when once the evidence has been properly admitted, it is for the jury, not the judge, to determine its value and cogency, and to decide what is the proper inference to be drawn from it.

It is the duty of the judge to call the attention of the jury to the more important facts on either side of the question; he may even state to the jury his own view of the matter in issue, but he should also inform them that they are not bound by the opinion which he has expressed, and that the question is one for them, and not for him, to decide.

On the trial of an indictment, only the jury can

(*u*) Objections as to the admissibility of evidence must be taken at the trial, otherwise the Court of Criminal Appeal cannot entertain them on the hearing of an appeal: *R.* v. *Sanders*, [1919] 1 K. B. 550.

find the prisoner guilty; and they should not do so unless his guilt be proved "beyond all reasonable doubt." It is not enough for the prosecution to raise strong grounds for suspicion; it must establish such a degree of probability in the minds of the jury as practically to amount to a moral certainty, for otherwise the presumption that the prisoner is innocent will not be rebutted. The jury must set aside all preconceptions and prejudices, and calmly review the facts laid before them, not merely counting the witnesses but weighing carefully what each has said. If there is then left in their minds a real doubt such as honest men of business would reasonably act upon in their own important concerns, they should acquit the prisoner (*x*).

The substance of the charge must be proved in accordance with the allegations of the indictment. Thus on an indictment for obtaining money by false pretences, it must be established that the money was obtained by means of the false pretence which is alleged in the indictment (*y*). Times and dates on which facts are stated in an indictment to have occurred, are not, as a rule, material; and where the facts are proved to have occurred upon some other date, the Court will amend the indictment. So it is not generally necessary to prove the offence to have been committed at the place named in the indictment, but it is enough to show that it was committed within the county, or within the jurisdiction of the Court.

If, however, time or place is of the essence of the offence, it must be strictly proved. Thus, a burglary may be proved to have been committed on any day

(*x*) See the remarks of POLLOCK, L.C.B., in *R.* v. *Manning*, cited from *The Times*, Oct. 27th, 1849, in Kenny's "Select Cases," at p. 447.
(*y*) *R.* v. *Bulmer*, L. & C. 476.

prior to that which is charged in the indictment; but it must be proved to have been committed between the hours of 9 p.m. and 6 a.m. So, on a charge of larceny, it is sufficient to prove that the prisoner stole some article or articles of the kind stated in the indictment; it is not necessary to prove that he stole the number of articles alleged, nor to show the value of any of them. A conviction will be warranted by evidence that he stole any one article, of any value, of those alleged in the indictment.

Moreover, by the Indictments Act, 1915 (*z*), a very wide power of amendment has been given to the judge at the trial, who may, in his discretion, amend an indictment which is defective in its details whenever no injustice will thereby be done to the prisoner. No general rule can be laid down for the guidance of the judge in the matter; he will weigh all the circumstances of the case before him and then exercise his discretion judicially. Presumably he will follow the old practice of refusing leave to amend, where the proposed amendment would in fact change the substance of the indictment, or substitute one charge for another; in such a case the prisoner might justly complain that he was suddenly called upon to meet a charge for which he was not prepared (*a*).

No amendment should be allowed after counsel for the defence has addressed the jury. Where the counsel for the prosecution has given all the evidence that he means to give, he should, if he wishes for an amendment, ask for it before he closes his case; and then, if the amendment

(*z*) 5 & 6 Geo. V. c. 90, s. 5.

(*a*) See, for instance, *R.* v. *Wright*, 2 F. & F. 320; *R.* v. *Hodgkiss*, L. R. 1 C. C. R., at p. 213; *R.* v. *Benson*, [1908] 2 K. B. 270; *R.* v. *Garland*, [1910] 1 K. B. 154.

is allowed, the counsel for the defence can address the jury on the indictment as amended (*b*).

If the jury acquit the prisoner, he is at once discharged. If, on the other hand, he is found guilty, he may, before sentence, call witnesses in mitigation of punishment. The prosecution may also at this stage prove any previous conviction against the prisoner, and the judge will also inquire into the prisoner's antecedents, his conduct since his last conviction, and into any other matters which may assist him in deciding as to his punishment. Such witnesses are usually sworn to give true answers to all such questions as the Court shall demand. The judge may permit them to be cross-examined. They are, however, not bound by the ordinary rules of evidence (*c*). At this stage the Court may properly act upon hearsay evidence (*d*) in passing sentence.

At any time before the verdict is given, the prisoner may move to quash the indictment, if he deems it bad in law (*e*). He may also, at any time after verdict and before sentence, move in arrest of judgment on any objection which appears on the face of the record. It is still open to the judge, if he thinks fit, to state a special case, as was frequently done in the days before the Court for Crown Cases Reserved was abolished (*f*). But the most usual course is now for a convicted person to appeal to the Court of Criminal Appeal, which came into existence on April 19th, 1908.

Evidence in the Court of Criminal Appeal.

By the Criminal Appeal Act, 1907 (*g*), upon the trial of any person at Quarter Sessions or Assizes, the proceedings,—that is, the evidence, the arguments and decision

(*b*) *R.* v. *Rymers*, 3 Car. & K. 326.
(*c*) *R.* v. *Douglas Campbell*, 6 Cr. App. R. 131.
(*d*) *R.* v. *Weaver*, 1 Cr. App. R. 12.
(*e*) This is now a most unusual proceeding, in view of the wide powers of amendment given to the Court.
(*f*) Criminal Appeal Act, 1907, s. 20. This was done in *R.* v. *Turner*, [1910] 1 K. B. 346.
(*g*) 7 Edw. VII. c. 23, s. 16 (1), and Criminal Appeal Rules, 1908, r. 5.

upon points of law, the summing up of the judge (*h*), the verdict of the jury, and, if the prisoner be found guilty, the evidence as to his character, and the sentence,—must be taken down by the official shorthand writer; and by this means an accurate record of the proceedings properly verified will be before the Court of Criminal Appeal, should an appeal be entered. This provision, however, is only directory, and not mandatory, so that if the trial takes place in the absence of a shorthand writer the trial is valid—if the prisoner is acquitted, he cannot be tried again; if he is convicted, his conviction cannot be quashed on that ground (*i*).

Machinery for the production on an appeal, either of the evidence called in the Court below or of fresh evidence, is provided by the Act (*k*), and the Rules made under the Act (*l*).

The judge or chairman of any Court before whom a person is convicted must, in the case of an appeal or of an application for leave to appeal under this Act, furnish to the registrar of the Court of Criminal Appeal, in accordance with the rules, his notes of the trial; and also a report giving his opinion upon the case or upon any point arising in it (*m*).

The registrar takes all necessary steps for obtaining the hearing of any appeals or applications, notice of which is given to him. He will obtain and lay before the Court in proper form all documents, exhibits, and other things relating to the proceedings in the Court below, which appear necessary for the proper determination of the appeal or application (*n*).

The Court of Criminal Appeal may (*o*), if they think it necessary or expedient in the interest of justice,—

"(*a*) order the production of any document, exhibit, or other thing connected with the proceedings, the production of

(*h*) *R.* v. *Bennett*, 25 T. L. R. 528.
(*i*) *R.* v. *Rutter*, 25 T. L. R. 73; *R.* v. *Elliott*, 100 L. T. 976.
(*k*) 7 Edw. VII. c. 23, ss. 8, 9, 15, 16.
(*l*) Criminal Appeal Rules, 1908, Nos. 8–12, 20.
(*m*) 7 Edw. VII. c. 23, s. 8, and Rules 14 and 15.
(*n*) *Ibid.*, s. 15 (1).
(*o*) *Ibid.*, s. 9.

which appears to them necessary for the determination of the case; and

(*b*) if they think fit order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of Court before any judge of the Court or before any officer of the Court or justice of the peace or other person appointed by the Court for the purpose and allow the admission of any depositions so taken as evidence before the Court; and

(*c*) if they think fit receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness, and, if the appellant makes an application for the purpose, of the husband or wife of the appellant, in cases where the evidence of the husband or wife could not have been given at the trial except on such an application; and

(*d*) where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in the opinion of the Court conveniently be conducted before the Court, order the reference of the question in manner provided by rules of Court for inquiry and report to a special commissioner appointed by the Court, and act upon the report of any such commissioner so far as they think fit to adopt it; and

(*e*) appoint any person with special expert knowledge to act as assessor to the Court in any case where it appears to the Court that such special knowledge is required for the proper determination of the case;

and exercise in relation to the proceedings of the Court any other powers which may for the time being be exercised by the Court of Appeal on appeals in civil matters, and issue any warrants necessary for enforcing the orders or sentences of the Court: Provided that in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial."

The Court of Appeal may order any document or exhibit to be produced by any person having the custody thereof, and the registrar can arrange for its inspection by any interested party (*p*). Copies of documents or exhibits can be obtained from the registrar upon payment of certain charges (*q*). Where the prosecutor declines to defend an appeal, he and his solicitor are bound to furnish to the Director of Public Prosecutions the necessary

(*p*) Rule 32.
(*q*) Rule 39.

information, documents, etc., in their possession or under their control (*r*).

Several cases have been decided with reference to the calling of fresh evidence on the hearing of the appeal. Thus, it has been held that the names of the fresh witnesses, and the points they are to prove, must be stated on the application for leave to call them (*s*), and the proposed evidence should be before the Court on affidavit when the application is made (*t*), but the Court may accept the statement in the application for leave. Where the Court makes an order for certain witnesses to be examined, the appellant is not at liberty to call other witnesses; in one case the hearing was adjourned to enable the Director of Public Prosecutions to make inquiries and have necessary witnesses in attendance (*u*). But permission to call fresh witnesses will not generally be given, unless the omission to call them at the trial is satisfactorily explained (*x*). But, under exceptional circumstances, an appellant, who had not given evidence himself in support of an *alibi*, was allowed to give evidence on appeal (*y*). And where witnesses were absent from the trial through a misunderstanding, they were allowed to be called on appeal (*z*). The result of producing evidence which was not called at the trial may be that the Court will quash the conviction (*a*) or reduce the sentence (*b*), but it cannot on such evidence increase the sentence (*c*).

The Court will rely upon the judge's notes and the shorthand writer's transcript of his notes. When statements have been made at the trial in the presence of the prisoner and his counsel, and the facts are brought

(*r*) Rule 27.
(*s*) *R.* v. *Lovett*, 1 Cr. App. R. 94.
(*t*) *R.* v. *Atkins*, 24 T. L. R. 807.
(*u*) *R.* v. *Laws*, 24 T. L. R. 630.
(*x*) *R.* v. *Mortimer*, 99 L. T. 204; *R.* v. *Martin*, 1 Cr. App. R. 33; *R.* v. *Hall*, 11 Cr. App. R. 221; *R.* v. *Perry*, 14 Cr. App. R. 48.
(*y*) *R.* v. *Malvisi*, 73 J. P. 372; *R.* v. *Schmidt*, 6 Cr. App. R. 288.
(*z*) *R.* v. *Hendry*, 25 T. L. R. 635; cf. *R.* v. *Hall*, 14 Cr. App. R. 58.
(*a*) *R.* v. *Betridge*, 73 J. P. 71; *R.* v. *Edwards*, 8 Cr. App. R. 38.
(*b*) *R.* v. *Dickenson*, 73 J. P. 287.
(*c*) 7 Edw. VII. c. 23, s. 9 *ad finem*.

before the Court of Appeal on affidavit, the Court will not allow it to be said that they are incorrect, unless some serious mistake is alleged (*d*). The Court will not quash a conviction, when evidence is forthcoming, after the trial, of previous convictions of a material witness for the prosecution, unless such convictions are of such a kind as to affect his credibility (*e*).

(*d*) *R.* v. *Weaver*, 1 Cr. App. R. 12.
(*e*) *R.* v. *Hampshire*, 1 Cr. App. R. 212.

CHAPTER II.

DISCOVERY IN CIVIL ACTIONS.

It will have been gathered from the preceding pages that our law discountenances, and indeed condemns, any attempt to induce an accused person to criminate himself. He may not be either browbeaten or cajoled into making any confession, nor is he called upon in any way to facilitate the proof of his guilt. But in civil proceedings a different rule holds. Each party to an action is invested with wide powers of extracting the truth from his opponent.

As soon as the issues in any civil action have been defined by the interchange of pleadings, each party begins to prepare his case for the hearing. He often discovers that he is without reliable information on certain material points; and he naturally endeavours to obtain this information in the first instance from his opponent. There may be matters as to which neither party is in possession of strict legal evidence; yet it is possible that his opponent may be willing to make admissions which will save the trouble and expense of obtaining such evidence *aliunde*. Hence the Master in a proper case allows one party to administer questions to the other, and compels that other to answer them, subject to certain restrictions; and the admissions

obtained by means of these "Interrogatories" (*a*) often save time, trouble and expense in preparing for the trial.

But, besides this discovery of facts, a party may also need disclosure of documents. Some material letters have, as a rule, passed between the parties before the dispute arose, which may contain the contract sued on, or be evidence of its breach, or of an independent tort; but the plaintiff has the defendant's letters, and the defendant has the plaintiff's, and neither set is properly intelligible without the other. Moreover, it is highly desirable that anyone who intends to give evidence should, if possible, before he enters the witness-box, read over his own letters written at the time when the events happened; for his recollection of an interview which took place many months ago is probably somewhat hazy now, and far less reliable than his account of it given in a letter written at the time. Hence it is always desirable for each party to see all material documents in the possession of his opponent, and to take copies of the more important ones. This object is attained by the process—formerly only available in Equity, but now freely used in all Divisions of the High Court—called "Discovery of Documents." The Master will, in a proper case, and subject to certain restrictions, order each party to make full disclosure to his opponent of all material documents in his possession, thus saving costs and avoiding "surprise" at the trial.

(*a*) Both interrogatories and the answers to them are in writing or printed (Order XXXI., rr. 1, 9) and are interchanged before the trial. An oral question addressed to a witness in the box at the trial which he is to answer then and there is not an "interrogatory."

But it is only after the litigation has commenced that there are these opportunities of acquiring information from the opponent. Till a writ has been issued—and, as a rule, until the questions in issue have been defined by the pleadings—the parties stand upon the defensive; neither is bound to facilitate litigation by admitting or disclosing anything. Nor is any third person under any legal duty to supply either of them with information to assist him in the cause.

It is strange that there is in England so little power before litigation has actually commenced of placing reliable information upon record in any shape which will render it admissible at a subsequent trial. In foreign systems of law much larger provision is made for what Bentham calls "pre-constituted" or "pre-appointed" evidence—that is, evidence taken purposely at the time when an event occurred or shortly afterwards (certainly before any litigation commenced).

There is, it is true, the memorandum of an agreement required by the Statute of Frauds, and the declaration as to pedigree made by an ancestor in a family Bible; but these are mere private entries, possessing no official authority. A commission to take the evidence of a witness who is dangerously ill or who will be out of the jurisdiction at the date of the trial cannot be obtained until an action is pending (*b*). So, too, a writ must be issued and served in order "to perpetuate testimony."

Proceedings to perpetuate testimony are now governed by Order XXXVII., Rules 35–38 (*c*). The practice under these Rules is this—the plaintiff having commenced his action in the ordinary way, and having in his statement of claim set out the facts which entitle him to commence the action under Rule 35, and the pleadings having been

(*b*) See *post*, p. 582.
(*c*) See Appendix, and *ante*, pp. 289, 290.

closed or the defendant having made default in delivering a defence (*d*), an order (*e*) will be made for the examination of the witnesses before an examiner of the Court, and the depositions will be filed in the usual manner. These depositions will not be sealed up, as was the former practice, but copies will be obtainable in the ordinary way as soon as they are filed; and they will be admissible in evidence in any subsequent action between the parties to the original action or their privies if the attendance of the witnesses themselves cannot be procured (*f*). A defendant can examine witnesses in an action to perpetuate testimony, as well as the plaintiff. The making of an order is a matter in which the Court has a discretion, and, therefore, where the matter in controversy was the legitimacy of the plaintiff, and this could be at once disposed of by an action under the Legitimacy Declaration Act, 1858, the Court refused to make an order in an action to perpetuate testimony (*g*).

It is very seldom, however, that a writ is issued to perpetuate testimony, as it was provided by Order XXV., r. 5 (which came into force in October, 1883), that—

"No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed or not" (*h*).

Hence the Court can now declare what the rights of the parties are or will be, although no ancillary relief is claimed, and even where no substantive relief can at present be given (*i*). Such declaration may be made on an interlocutory application whether by petition or

(*d*) *Marquess of Bute* v. *James*, 33 Ch. D. 157.
(*e*) As to the form of the order, see *Burton* v. *North Staffordshire Rail. Co.*, 35 W. R. 536.
(*f*) See *Beresford* v. *Att.-Gen.*, [1918] P. 33.
(*g*) *West* v. *Lord Sackville*, [1903] 2 Ch. 378.
(*h*) See *Honour* v. *Equitable Life Society*, [1900] 1 Ch. 852; *Société Maritime* v. *Venus Steam Shipping Co.*, 9 Com. Cas. 289; and *per* LINDLEY, M.R., in *Ellis* v. *Duke of Bedford*, [1899] 1 Ch., at p. 515.
(*i*) *Evans* v. *Manchester, Sheffield and Lincolnshire Rail. Co.*, 36 Ch. D. at p. 640; *London Association of Shipowners* v. *London and India Docks*, [1892] 3 Ch. 242.

summons (*k*). But the jurisdiction under this rule will be exercised with great caution (*l*). The Court can in its discretion make a declaration as to a future right; but it will not do so if such a declaration would be "embarrassing or useless for any good purpose" (*m*).

There is also the power of making statutory declarations under the Statutory Declarations Act, 1835, which by the practice of conveyancers are accepted as evidence of incidental matters arising on the proof of title to real property (*n*).

As soon, however, as a writ is issued, the Rules of the Supreme Court afford to either litigant abundant opportunities of acquiring—and to some extent of recording—information which will be needed at the trial of the action. Thus, as we have already seen (*o*), the pleadings, if fairly drafted, frequently contain valuable admissions. But it is most important for the parties to ascertain before the hearing what are the exact points on which there will be a conflict of evidence at the trial. Information as to facts can generally be ascertained by means of interrogatories.

INTERROGATORIES.

On the hearing of a summons for directions in any action, either party may apply to the Master

(*k*) *In re St. Nazaire Co.*, 12 Ch. D., at p. 94.

(*l*) *Faber* v. *Gosworth Urban District Council*, 88 L. T. 549.

(*m*) *Per* JELF, J., in *Attorney-General* v. *Scott*, 20 T. L. R., at p. 633; and see, for examples, *Islington Vestry* v. *Hornsey U. D. C.*, [1900] 1 Ch. 695; *Young* v. *Ashley Gardens Properties, Ltd.*, [1903] 2 Ch. 112; *Ankerson* v. *Conelly*, [1907] 1 Ch. 678.

(*n*) In some cases, however, a statutory declaration made in a colony under that Act has been received as evidence when verified by an affidavit: see *In re Hardwick*, [1907] W. N. 180.

(*o*) See *ante*, p. 364.

for leave to deliver interrogatories to his opponent, and for an order that he shall answer them on oath before the trial; he does so in an affidavit, which he must file within ten days or within such other time as the Master may fix (*p*). But a party is not permitted to administer to his opponent whatever questions he pleases. The particular interrogatories proposed to be delivered must be submitted to the Master, whose leave must be obtained before they can be administered. The Master will only allow such questions as "he shall consider necessary either for disposing fairly of the cause or matter or for saving costs," and before giving leave to administer them he will take into consideration any offer, which may be made by the party sought to be interrogated, to deliver particulars, or to make admissions, or to produce documents relating to any of the matters in question (*q*). The party interrogating may be ordered, before delivering the interrogatories to his opponent, to pay into the "Security for Costs Account," to abide further order, a sum of money fixed by the Master, though such an order is now seldom made (*r*).

A party who administers interrogatories generally has three objects. In the first place, he hopes to obtain admissions to facilitate the proof of his own case; secondly, he desires to ascertain, so far as he may, the case of his opponent; and, thirdly, he may seek to obtain admissions which tend to destroy that case (*s*), whether he has in fact ascertained it or only anticipates

(*p*) Order XXXI., rr. 1, 8.
(*q*) *Ibid.*, r. 2.
(*r*) *Ibid.*, r. 26.
(*s*) See *Grumbrecht* v. *Parry*, 32 W. R. 558; *Hennessy* v. *Wright* (No. 2), 24 Q. B. D. 445, n.

that the case he is seeking to destroy will be set up (*t*). Even if he cannot elicit the admissions he desires, he may at all events get some definite statement sworn to from which his opponent cannot afterwards diverge.

There are, however, certain rules (*u*) which determine what interrogatories may be administered and what not. The most important of these rules is that interrogatories must be relevant to the matters in issue (*x*). Thus, where the defendant in an action of libel or slander has set up the defence of fair comment, and placed on the record the plea "In so far as the words complained of consist of statements of fact the same are in their natural and ordinary signification true in substance and in fact" (*y*), he will be allowed, notwithstanding the absence of a plea of justification, to administer to the plaintiff interrogatories directed to proving the truth of the statements upon which the action is brought and of those alleged in the particulars delivered by him of the materials upon which his defence of fair comment was based (*z*).

But the defendants in an action of libel will not be allowed to administer to the plaintiffs an interrogatory in the following form:—"Do you intend to set up that the defendants, in publishing the words complained of, were actuated by express malice towards the plaintiffs? If yea, state generally the facts and circumstances on which the plaintiffs rely as showing actual malice" (*a*).

Not every question which could be asked a witness in the box may be put as an interrogatory. Thus, questions which are only put to test the credibility of the witness will not be allowed, although, of course, they may be asked in cross-examination (*b*). Again, no

(*t*) *Attorney-General* v. *Corporation of London*, 2 Mac. & G. 260.
(*u*) See Odgers on Pleading and Practice, 8th ed., pp. 293–301.
(*x*) Order XXXI., r. 6.
(*y*) See *Penrhyn* v. *Licensed Victuallers' Mirror*, 7 T. L. R. 1.
(*z*) *Peter Walker & Son, Ltd.* v. *Hodgson*, [1909] 1 K. B. 239.
(*a*) *Lever Brothers* v. *Associated Newspapers*, [1907] 2 K. B. 626. But a defendant cannot be interrogated as to what he meant by his words: *Heaton* v. *Goldney*, [1910] 1 K. B. 754.
(*b*) *Allhusen* v. *Labouchere*, 3 Q. B. D. 654; and see the concluding words of Order XXXI., r. 1; *In re Morgan*, 39 Ch. D. 316.

question will be allowed which is not put *bonâ fide* for the purposes of the present action, but with a view to future litigation. Thus, an interrogatory, which asks the defendant if he did not do the acts complained of, who did? will be disallowed. Such a question is quite irrelevant to the action. A person who thinks he has a cause of action and does not know whom to sue is not entitled to sue someone who does know the person liable and compel him to reveal on oath who that person is (*c*).

Again, leave will not be given to administer a question directed in any other respect to elicit facts which cannot assist the plaintiff's case or form a defence to the action (*d*).

The questions should be directed to the evidence by which it is desired to establish the material facts in issue at the trial (*e*). Either party may interrogate as to any link in the chain of evidence necessary to substantiate his case (*f*). If the defendant wishes to pay money into court, he can interrogate the plaintiff as to the actual damage sustained, in order to have a guide as to the amount to pay in (*g*). So, too—in some cases—interrogatories are admissible as to matters which are only relevant in aggravation or mitigation of damages (*h*).

The party interrogating may interrogate as to "anything which can be fairly said to be material to enable him either to maintain his own case or to destroy the case of his adversary" (*i*). He can compel his adversary to disclose the facts on which he intends to rely, but not the evidence by which he proposes to prove those facts;

(*c*) *Pankhurst* v. *Wighton*, 2 T. L. R. 745; cf. *Hope* v. *Brash*, [1897] 2 Q. B. 188; *Spiers and Pond, Ltd.* v. *John Bull, Ltd.*, 85 L. J. K. B. 992.

(*d*) *Rogers* v. *Lambert*, 24 Q. B. D. 573; *Pankhurst* v. *Hamilton*, 2 T. L. R. 682; cf. *Kennedy* v. *Dodson*, [1895] 1 Ch. 334.

(*e*) *Attorney-General* v. *Gaskill*, 20 Ch. D. 519.

(*f*) See *Jones* v. *Richards*, 15 Q. B. D. 439.

(*g*) *Frost* v. *Brook*, 23 W. R. 260; *Horne* v. *Hough*, L. R. 9 C. P. 135.

(*h*) See *Scaife* v. *Kemp*, [1892] 2 Q. B. 319; *Whittaker* v. *Scarborough Post*, [1896] 2 Q. B. 148.

(*i*) *Per* Lord ESHER, M.R., in *Hennessy* v. *Wright*, (No. 2), 24 Q. B. D., at p. 447, n.; and see *Nash* v. *Layton*, [1911] 2 Ch. 71.

for instance, he cannot, as a rule, ask his opponent to name the witnesses whom the latter intends to call at the trial (*k*).

But the mere fact that the answer will reveal the names of the witnesses has never been an objection to a question which is otherwise admissible. As Lord LANGDALE said in *Storey* v. *Lord Lennox* (*l*):—

> "The defence here is that the letters may disclose the names of the witnesses and the evidence; and so indeed may every discovery which the defendant may be required to give. In telling the truth, as he is bound to do, he may incidentally disclose to the plaintiff that which will enable the plaintiff to learn the names of the witnesses and the nature of the evidence; and, if this consequence could be used as a ground for resisting a discovery, one of the most extensively useful parts of the jurisdiction of the Courts would be lost."

But even when interrogating as to his own case, neither party may ask "fishing" questions, that is, questions which do not relate to some definite and existing state of circumstances, but are put merely in the hope of discovering something which may help the party interrogating to make out some case. Interrogatories must be confined to matters which there is good ground for believing to have occurred. Thus, where the plaintiff sued the defendant for a libel charging the former with blasphemy on a particular occasion, the defendant was not allowed to interrogate with the object of making the plaintiff admit that he had on other occasions said something very like the words he was alleged to have used on that occasion (*m*).

Interrogatories are not allowed as to the contents of written documents, unless it is admitted that such documents have been lost or destroyed (*n*). Nor will they be

(*k*) *Eade* v. *Jacobs*, 3 Ex. D. 335; but see *Marriott* v. *Chamberlain*, 17 Q. B. D. 154; *Birch* v. *Mather*, 22 Ch. D. 629; *Ashworth* v. *Roberts*, 45 Ch. D. 623; *Knapp* v. *Harvey*, [1911] 2 K. B. 725.

(*l*) 1 Keen, 341.

(*m*) *Pankhurst* v. *Hamilton*, 2 T. L. R. 682; and see *per* COZENS-HARDY, M.R., in *Hooton* v. *Dalby*, [1907] 2 K. B., at p. 20; *Barham* v. *Lord Huntingfield*, [1913] 2 K. B. 193; but see *Dalgleish* v. *Lowther*, [1899] 2 Q. B. 590.

(*n*) *Stein* v. *Tabor*, 31 L. T. 444; *Fitzgibbon* v. *Greer*, Ir. R. 9 C. L. 294; but see *Rattenberry* v. *Monro*, 103 L. T. 560.

allowed to contradict a written document (*o*). But a party may be asked what has become of a particular document, and if it has been lost or destroyed to set out the contents thereof (*p*).

Questions which tend to criminate the person interrogated may be asked, but he is not bound to answer them (*q*). This privilege, if claimed at all, can only be claimed in the affidavit filed in answer to the interrogatories (*r*). Nor is it any objection that the interrogatories will tend to criminate others, if they are put *bonâ fide* for the purposes of the action (*s*). It never has been an objection that answering the questions would expose the party interrogated or third persons to a civil action (*t*).

Objection may also be taken to an interrogatory on the ground that it is scandalous, that is, it alleges something which it is unbecoming for the Court to hear or contrary to good manners. For instance, allegations of crime or reflections on the moral character of individuals are scandalous, if not necessary to the action. But nothing that is material, however disgraceful it may be, is scandalous (*u*). The sole test is whether the fact alleged would be admissible to prove or disprove any material allegation (*x*).

Actions for the recovery of land are, as regards interrogatories, on the same footing as other actions (*y*). The plaintiff can interrogate the defendant in order to

(*o*) *Moor* v. *Roberts*, 3 C. B. (N.S.) 671.

(*p*) *Wolverhampton New Water Works Co.* v. *Hawksford*, 5 C. B. (N.S.) 703; *Dalrymple* v. *Leslie*, 8 Q. B. D. 5; *Jones* v. *Monte Video Gas Co.*, 5 Q. B. D. 556, 568; but see *Hall* v. *Truman*, 29 Ch. D. 307; *Morris* v. *Edwards*, 15 App. Cas. 309.

(*q*) *Alabaster* v. *Harness*, 70 L. T. 375.

(*r*) Order XXXI., r. 6.

(*s*) *McCorquodale* v. *Bell*, [1876] W. N. 39.

(*t*) *Tetley* v. *Easton*, 18 C. B. 643.

(*u*) *Fisher* v. *Owen*, 8 Ch. D. 645; *Allhusen* v. *Labouchere*, 3 Q. B. D., pp. 660, 661, 666; *National Association, etc.* v. *Smithies*, [1906] A. C. 434.

(*x*) *Per* Lord SELBORNE in *Christie* v. *Christie*, L. R. 8 Ch. 503.

(*y*) *Lyell* v. *Kennedy*, 8 App. Cas. 217; *Milbank* v. *Milbank*, [1900] 1 Ch. 376; *Miller* v. *Kirwan*, [1903] 2 Ir. R. 120.

prove steps in his title. But no interrogatory will be permitted if the answer might subject the defendant to a forfeiture. Thus, a tenant cannot be interrogated as to whether he has not broken the covenant of his lease prohibiting assignment or underletting (*z*), but he may be asked whether his term or interest has not expired by effluxion of time (*a*).

Again, leave may be refused on the ground that the subject of inquiry is not sufficiently material at that stage of the action. The Court will not, as a rule, allow interrogatories, which may injure the defendant and can only assist the plaintiff if he succeeds, to be administered before the right to relief has been established (*b*). Thus, where the defendant in an action for infringing a patent denied the infringement, interrogatories, designed to assist the plaintiff after he had established the infringement, were disallowed (*c*). But where the plaintiff sued for a declaration that the defendants were partners of her late husband, and interrogated them as to their drawings out of the business, it was held that the interrogatory must be answered (*d*). So, an executor, if required, must set out his accounts in his answer (*e*); and a mortgagee in possession who admits that the mortgagor has a right to redeem is bound to answer interrogatories as to the state of the accounts (*f*); for in actions of account the defendant, even when he denies the plaintiff's title, must answer fully, even as to consequential matters of account. But this right must not be pressed too far. The Court will not allow the questions

(*z*) *Fane* v. *Atlee*, (1700) Eq. Ca. Ab. 77; *Pye* v. *Butterfield*, 5 B. & S. 829; *Mexborough* (*Earl of*) v. *Whitwood U. D. C.*, [1897] 2 Q. B. 111.

(*a*) Wigram on Discovery, 81.

(*b*) See *per* COTTON, L.J., in *Fennessy* v. *Clark*, 37 Ch. D., at p. 187.

(*c*) *De la Rue* v. *Dickinson*, 3 K. & J. 388; but see *Osram, etc.* v. *Gabriel Lamp Co.*, [1914] 2 Ch. 129.

(*d*) *Saull* v. *Browne*, L. R. 9 Ch. 364; cf. *Saccharin Corporation* v. *Anglo, etc., Works*, [1901] 1 Ch. 414; but see *Blair* v. *Haycock*, 34 T. L. R. 39.

(*e*) *Thompson* v. *Dunn*, L. R. 5 Ch. 573; *Alison* v. *Alison*, 50 L. J. Ch. 574.

(*f*) *Elmer* v. *Creasy*, L. R. 9 Ch. 69.

if it is satisfied that they are only put in order to cause vexation or oppression (*g*). Thus, where the plaintiff sued the defendant for an account, alleging that the defendant was his agent, he was not allowed to compel the defendant to answer interrogatories as to what appeared to be the latter's private transactions (*h*). The Court said:—

"It would be monstrous that a man, by merely alleging that he had a share in the concern, which allegation was denied and had not been established, and whilst it was doubtful whether it would be established, could get the accounts of the defendant's private business and of his dealings with other people."

Even if the Master has allowed the interrogatories, the party interrogated may take steps to avoid answering. He may appeal from the Master to the Judge at chambers. He has a further appeal from the Judge at chambers to the Court of Appeal, and thence to the House of Lords. But unless there is some error of principle or any substantial injustice can be shown to have been done, the Court of Appeal will not interfere with the Judge's order. It protests against being called upon to settle interrogatories (*i*).

Formerly he could apply to have them set aside (*k*), on the ground either that as a whole they were exhibited unreasonably or vexatiously or that any of them were prolix, oppressive, unnecessary or scandalous. Applications, however, were rarely made under this order, and it has been annulled. The practice now is for the party interrogated to take any objection he may have to answer any particular interrogatory in his affidavit in answer. This he can do, even if he has raised it before (*l*).

Interrogatories must be answered fully and clearly, and

(*g*) See, for example, *White & Co.* v. *Credit Reform Association, Ltd.*, [1905] 1 K. B., p. 659.
(*h*) *Great Western Colliery Co.* v. *Tucker*, L. R. 9 Ch. 376.
(*i*) *Per* LINDLEY, L.J., in *Peek* v. *Ray*, [1894] 3 Ch., at p. 286.
(*k*) *Oppenheim* v. *Sheffield*, [1893] 1 Q. B. 5; and see *Dalgleish* v. *Lowther*, [1899] 2 Q. B. 590.
(*l*) *Peek* v. *Ray*, [1894] 3 Ch. 282; *Fisher* v. *Owen*, 8 Ch. D. 645.

with a reasonable amount of detail (*m*). The answers may, however, be guarded and carefully qualified so long as both the admission and the qualification are clear and definite (*n*). But an answer which introduces irrelevant matter is insufficient (*o*). So, too, is an answer which is embarrassing, that is, which prevents the party interrogating from using it without having thrust upon him irrelevant matter as a part of it (*p*).

It is *primâ facie* a good answer to an interrogatory for the person interrogated to answer, "I do not know anything about this matter of my own knowledge" (*q*), but before making this answer he is bound to examine all documents in his own possession from which the information could be readily obtained; he is also bound to make inquiries from such of his servants or agents who would naturally, in their capacity as such, have acquired such information (*r*). But he is not bound to make inquiries from his rivals in the trade, or indeed of any third person (*s*), still less of a discharged servant or agent. The mere fact that the investigation of the matter by the party interrogated or his servants or agents would involve great trouble and expense is no excuse for not answering, unless the trouble and expense thereby caused would be wholly out of proportion to the value of the information when obtained (*t*). Where the defendant in an action of libel has pleaded privilege, his *bona fides* become material, and either party may interrogate the other with a view of proving or disproving

(*m*) *Per* BOWEN, L.J., in *Lyell* v. *Kennedy*, 27 Ch. D., at p. 28.
(*n*) *Malone* v. *Fitzgerald*, 18 L. R. Ir. 187.
(*o*) See *Pegler* v. *King*, L. R. 9 C. P. 9.
(*p*) *Willis* v. *Baddeley*, [1892] 2 Q. B. 324.
(*q*) *Per* BRETT, J., in *Phillips* v. *Routh*, L. R. 7 C. P. 287; *Field* v. *Bennett*, 2 T. L. R. 91, 122.
(*r*) *Per* NORTH, J., in *Rasbotham* v. *Shropshire, etc., Co.*, 24 Ch. D., at p. 113; *Bolckow* v. *Fisher*, 10 Q. B. D. 161; *Alliott* v. *Smith*, [1895] 2 Ch. 111; *Hall* v. *L. and N. W. Rail. Co.*, 35 L. T. 848.
(*s*) *Ehrmann* v. *Ehrmann*, [1896] 2 Ch. 611; *Welsbach, etc., Co.* v. *New Sunlight Co.*, [1900] 2 Ch. 1.
(*t*) *Hall* v. *L. and N. W. Rail. Co.*, *supra*.

malice (*u*). So, too, where the defendant in an action of libel or slander has pleaded that he published the words complained of "in good faith and without malice," or "in the honest belief that they were true," he may be asked what information he had at the date of publication that induced him to believe that the words were true, and what steps, if any, he had taken, before publishing the words, to ascertain whether they were true or not (*x*). He may also, as a general rule, be asked, "From whom did you obtain such information?"—unless the Court is satisfied that this interrogatory is not put *bonâ fide* for the purposes of the pending action, but with a view to future litigation (*y*). In actions against newspapers, however, this question in the absence of special circumstances is not allowed (*z*); nor is it permissible in an action for malicious prosecution (*a*).

As a general rule, however, unless the state of mind of the party interrogated is in issue, he can only be asked as to matters which are within his own knowledge or that of his servants or agents; he cannot be interrogated as to his information and belief apart from such knowledge. *À fortiori*, he cannot be compelled to answer interrogatories asking as to his knowledge, information, or belief with regard to matters of fact, if he swears that he has no knowledge or information with regard to those matters except such as he has derived from privileged communications made to him by his solicitors or their agents; for since under those circumstances his knowledge and information are protected, so also is his belief when derived solely from such communications (*b*).

(*u*) *Cooper* v. *Blackmore*, 2 T. L. R. 746; *Martin and Wife* v. *British Museum*, 10 T. L. R. 215; *Caryll* v. *Daily Mail Publishing Co., Ltd.*, 90 L. T. 307.

(*x*) *Elliott* v. *Garrett*, [1902] 1 K. B. 870; *Saunderson* v. *Baron von Radeck*, 119 L. T. Jo. 33 (H. L.).

(*y*) *White & Co.* v. *Credit Reform Association, Ltd.*, [1905] 1 K. B. 653; *Edmondson* v. *Birch & Co., Ltd.*, [1905] 2 K. B. 523; *Adams* v. *Fisher*, 110 L. T. 537.

(*z*) *Plymouth Mutual Co-operative Society, Ltd.* v. *Traders' Publishing Association, Ltd.*, [1906] 1 K. B. 403.

(*a*) *Maass* v. *Gas Light and Coke Co.*, [1911] 2 K. B. 543.

(*b*) *Lyell* v. *Kennedy* (No. 2), 9 App. Cas. 81; *Procter* v. *Raikes*, 3 T. L. R. 229; cf. *Procter* v. *Smiles*, 55 L. J. Q. B. 467, 527.

If the answers are insufficient or evasive, the party interrogating may by notice call on the opponent to show cause why he should not make and file a further and better affidavit in answer (*c*). The notice, which must specify the interrogatories or parts of interrogatories to which a better answer is required (*d*), should be given promptly (*e*). The Master has power to order a *vivâ voce* examination (*f*), but this is rarely done. If the answers contain irrelevant matter, which prevents the party interrogating from making a fair use of the answers, he may apply to have such matter struck out (*g*). Where the answers are used at the trial, any one or more or parts thereof may be put in, but if only part is put in, and the Judge is of opinion that answers not put in are so connected with those put in that the latter ought not to be used without the former, he may direct that all the answers which he thinks are material shall be put in (*h*).

The Rules of the Supreme Court do not apply to the procedure in divorce and other matrimonial causes (*i*), but the Probate, Divorce and Admiralty Division has, by the Judicature Act, 1873, the same powers as to discovery which were possessed by the old Courts of law and equity (*k*), and in such matters the Court will now follow the analogy of the Rules of the Supreme Court (*l*).

The Crown is entitled to discovery against a subject, but a subject is not entitled to discovery against the Crown (*m*). But a foreign Sovereign or State bringing

(*c*) Order XXX., r. 5.

(*d*) *Church* v. *Perry*, 36 L. T. 513; *Anstey* v. *North and South Woolwich Subway Co.*, 11 Ch. D. 439.

(*e*) *Lloyd* v. *Morley*, 5 L. R. Ir. 74.

(*f*) Order XXXI., r. 11.

(*g*) For the penalty incurred by default in answering, see *post*, p. 646.

(*h*) Order XXXI., r. 24.

(*i*) Order LXVIII., r. 1 (d).

(*k*) *Harvey* v. *Lovekin*, 10 P. D. 122.

(*l*) In county courts the procedure, which is regulated by the County Court Rules, 1903–1920, is analogous to that of the High Court.

(*m*) *Attorney-General* v. *Newcastle Corp.*, [1897] 2 Q. B. 384.

an action in this country is in this respect on the same footing as a private individual (*n*). The rules as to interrogatories now apply to infants and their next friends and guardians *ad litem* (*o*). Interrogatories cannot be administered in a penal action (*p*), nor in any action for moneys forfeited under s. 60 of the Patents and Designs Act, 1907 (*q*).

DISCOVERY OF DOCUMENTS.

Besides the discovery of facts which he can obtain by means of interrogatories, each party will in most cases desire to ascertain what material documents are in the possession of his opponent, and to take copies of such of them as are of importance. This he can do in the ways sanctioned by Order XXXI., the rules of which apply to both the King's Bench and Chancery Divisions (*r*).

There are three distinct cases which must be dealt with separately, as the procedure in each case is different:—

(i.) It may be that one party has in his pleadings, particulars, or affidavits referred to some document, and he cannot say that it is not material, as he relies on it himself. His opponent is in such a case entitled, without filing any affidavit or making any payment into Court, at once to give notice (*s*) that he will come and inspect that document, and

(*n*) *South African Republic* v. *La Compagnie Franco-Belge*, [1898] 1 Ch. 190; *Prioleau* v. *United States, and Johnson*, L. R. 2 Eq. 659.
(*o*) Order XXXI., r. 29.
(*p*) *Martin* v. *Treacher*, 16 Q. B. D. 507; *Jones* v. *Jones*, 22 Q. B. D. 425; *Hobbs* v. *Hudson*, 25 Q. B. D. 232.
(*q*) 7 Edw. VII. c. 29; cf. *Saunders* v. *Wiel*, [1892] 2 Q. B. 18, 321.
(*r*) See Appendix. In the event of conflict between the practice of the two Divisions the Court will adopt whichever is the more convenient practice: *Newbiggin Gas Co.* v. *Armstrong*, 13 Ch. D. 310
(*s*) Under Order XXXI., r. 15.

take a copy of it if he thinks fit. And the party who has referred to the document must produce it for inspection, if he has it in his possession, at the time named in the notice; if he does not, he cannot himself put it in evidence at the trial, unless he can satisfy the judge that he had some sufficient reason for not producing it.

It is now sufficient to state in a pleading the effect of any relevant document, unless its precise terms are material (*t*). This rule is intended to give the other party the same advantage as if the documents were fully set out in the pleading or affidavit in which they were referred to (*u*), and for this purpose a mere general reference is enough (*x*).

Copies of the documents referred to cannot be inspected under this rule—unless, of course, the documents referred to are themselves copies. When certain entries only in a book are referred to, then those entries, but not the entire book, can be inspected (*u*). If a document is exhibited to an affidavit, then a party entitled to see the affidavit can inspect the exhibit (*y*). This does not apply, however, to exhibits which have been laid before the Court for the information of the Court alone. Thus, if a plaintiff sues *in formâ pauperis*, the defendant cannot claim to see the case, laid by plaintiff before counsel, which is required by the rules to be exhibited to an affidavit and filed in the Court (*z*).

The party asking for inspection may apply for an order for production of these documents, if his notice to produce is disregarded or not properly complied with. And the *onus* lies on his opponent to show why the order should not be made (*a*). He does not by referring to a privi-

(*t*) Order XIX., r. 21.
(*u*) *Quilter* v. *Heatly*, 23 Ch. D. 42.
(*x*) *Smith* v. *Harris*, 48 L. T. 868.
(*y*) *In re Hinchliffe*, [1895] 1 Ch. 117.
(*z*) *Sloane* v. *Britain Steamship Co.*, [1897] 1 Q. B. 185.
(*a*) *Quilter* v. *Heatly*, 23 Ch. D. 42.

leged document lose his right to set up his privilege (*b*), but if he does set up the claim after so doing, he cannot put it in evidence at the trial without special leave (*c*). It would seem, in spite of the terms of r. 18, that the term "affidavits," as used in the rule under discussion, includes an affidavit of documents under r. 12, and this is the practice of the King's Bench Division, and, although the contrary practice was followed in the Chancery Division, it has been decided that the same practice should be adopted there (*d*).

It would also seem that an affidavit in answer to interrogatories is within the rule (*e*). And so is an affidavit which is sworn but not filed. Particulars are included within the term "pleadings" (*f*).

(ii.) In the second place, it may be that one party knows, or thinks he knows, that the other has certain material documents in his possession, though they are not referred to in any pleading, particular, or affidavit. In such a case he may file an affidavit, stating his belief and the grounds of his belief, specifying the particular documents and showing that they are material (*g*). Upon this the Master can order his opponent to state on affidavit whether he has or ever had any of those documents in his possession or power, and, if he ever had one of them and has not now, when he parted with it, and what has become of it (*h*). If in this affidavit he admits that he has any of the documents specified, and that it is material, it becomes at once

(*b*) *Roberts* v. *Oppenheim*, 26 Ch. D. 724.
(*c*) Order XXXI., r. 15.
(*d*) *Pardy's Mozambique Syndicate* v. *Alexander*, [1903] 1 Ch. 191.
(*e*) *Moore* v. *Peachey*, [1891] 2 Q. B. 707.
(*f*) *In re Fenner and Lloyd*, [1897] 1 Q. B. 667.
(*g*) *White* v. *Spafford & Co.*, [1901] 2 K. B. 241.
(*h*) Order XXXI., r. 19A (3).

a document referred to in an affidavit within the preceding paragraph.

(iii.) If a party does not know precisely what documents his opponent possesses, he may, without filing any affidavit, or naming any particular document, apply to a Master for an order (*i*) directing any opponent in the action to disclose on oath all documents which are, or have been, in his possession or power, relating to any matter in question in the action. A plaintiff can obtain such discovery from any necessary defendant (*k*); and one defendant can obtain such discovery from his co-defendant, if there be some right to be adjusted between them in the action (*l*). The Master has power to order whichever party makes the application to pay into the "Security for Costs Account," to abide further order, a small sum of money, but such an order is now seldom made (*m*).

On the hearing of the application, the Master will order such discovery only when, and only so far as, he deems it necessary either for disposing fairly of the action or for saving costs (*n*). If he is satisfied that discovery is not necessary, he will refuse the application; if he deems it not necessary at the present stage of the action, he will adjourn the application as being premature. In other cases he will order either general discovery, or, if he thinks

(*i*) Under Order XXXI., r. 12.

(*k*) *Spokes* v. *Grosvenor Hotel Co.*, [1897] 2 Q. B. 124.

(*l*) *Shaw* v. *Smith*, 18 Q. B. D. 193; *James Nelson & Sons, Ltd.* v. *Nelson Line, Ltd.*, [1906] 2 K. B. 217; *Birchall* v. *Birch, Crisp & Co.*, [1913] 2 Ch. 375.

(*m*) Order XXXI., r. 26.

(*n*) Order XXXI., r. 12; *Attorney-General* v. *North Metropolitan Tramways Co.*, [1892] 3 Ch. 70; *In re Wills' Trade Marks*, [1892] 3 Ch. 201, 207.

fit, discovery limited to certain classes of documents; thus, if particulars have been delivered, discovery will be limited to the issues as narrowed by the particulars (*o*).

The party against whom an order for discovery is made must make an affidavit disclosing all the relevant documents in his possession. Not only those documents which are evidence to prove or disprove any matter in question in the action are relevant. Every document must be disclosed which may either directly or indirectly enable either party to advance his own case or to damage the case of his adversary (*p*).

A defendant cannot obtain discovery of documents from a co-defendant unless there is an issue between them pending in the action (*q*); nor, it would appear, can a plaintiff obtain discovery of documents from a third party brought in by the defendants, unless the third party has liberty to oppose the plaintiff's claim (*r*). A defendant has been held entitled to production of documents, although in contempt (*s*).

The rules of Court as to discovery now apply to infant plaintiffs and defendants and their next friends and guardians *ad litem*, in the same way as to other litigants (*t*).

No order for discovery will be made against the defendant in an action for the recovery of demised premises on the ground of an alleged forfeiture by breach of covenant (*u*).

(*o*) *Yorkshire Provident Co.* v. *Gilbert*, [1895] 2 Q. B. 148; *Arnold and Butler* v. *Bottomley*, [1908] 2 K. B. 151.
(*p*) *Per* BRETT, L.J., in *Compagnie Financière du Pacifique* v. *Peruvian Guano Co.*, 11 Q. B. D., at p. 63.
(*q*) *Brown* v. *Watkins*, 16 Q. B. D. 125.
(*r*) *Eden* v. *Weardale, etc., Co.*, 34 Ch. D. 223.
(*s*) *Haldane* v. *Eckford*, L. R. 7 Eq. 425.
(*t*) Order XXXI., r. 29.
(*u*) *Mexborough (Earl of)* v. *Whitwood U. D. C.*, [1897] 2 Q. B. 111; and see *Miller* v. *Waterford Harbour Commissioners*, [1904] 2 Ir. R. 421.

Affidavit of Documents.

The party against whom a general order for discovery is made must make an affidavit and specify in the schedules to it all the documents which are, or have been, in his possession, material to the matters in dispute in the action. He must describe them with particularity sufficient to identify them hereafter should the Court think fit to order any of them to be produced (*x*). He must specify all material documents, whether he objects to produce them or not. Any document which he sets out he thereby admits to be material. Hence he should make no reference in his affidavit to any document which he honestly believes to be irrelevant to the action. Every document which will throw any light on any part of the case is material, and must be disclosed. If some portion of a document or book is relevant and the rest not, he must specify which portions he admits to be relevant; he has the document or book in his possession, and he must therefore take upon himself the responsibility of stating on oath which parts do and which do not relate to the matters in question (*y*).

The party who makes an affidavit of documents must also specify in it which of the documents disclosed he objects to produce, and state the grounds for his objections (*z*). He may lawfully refuse to produce (though not, as a rule, to disclose) documents of various classes which we now proceed to discuss.

(*x*) *Taylor* v. *Batten*, 4 Q. B. D. 85; *Morris* v. *Edwards*, 15 App. Cas. 309; *Milbank* v. *Milbank*, [1900] 1 Ch. 376.
(*y*) *Yorkshire Provident Co.* v. *Gilbert*, [1895] 2 Q. B. 148, 153.
(*z*) *Heugh* v. *Garrett*, 44 L. J. Ch. 305.

DOCUMENTS PRIVILEGED FROM PRODUCTION.

As every relevant document is *primâ facie* open to inspection, the claim of privilege must be clearly made (*a*). If it be upheld, the deponent cannot be compelled to show the document to his opponent (*b*). He may nevertheless produce it at the trial if he thinks fit; if he does not, his opponent will not be able to make any use of it, unless he can in some way obtain admissible secondary evidence of its contents.

He may claim privilege for any document which falls within any of the following classes:—

(i.) Documents that relate solely to his own title;

(ii.) Documents which relate solely to his own case;

(iii.) Communications passing between him and his legal advisers;

(iv.) Documents prepared with a view to litigation;

(v.) Documents the production of which would tend to criminate him;

(vi.) Documents which though physically in his possession are the property of a third person who forbids their production;

(vii.) Documents the production of which would be prejudicial to public interests.

(i.) *Documents that relate solely to the deponent's title.*

A deponent is not bound to produce any documents which he can swear relate solely to his own title to real

(*a*) *Per* Blackburn, J., in *Hutchinson* v. *Glover*, 1 Q. B. D. 141.
(*b*) *Clegg* v. *Edmondson*, 22 Beav. 125, 167.

property and contain nothing which tends to establish his opponent's title (*c*). He need not also swear that they contain nothing to impeach his own case (*d*). But if they are material to his opponent's case, he must disclose them, even when the deponent is a purchaser for value without notice (*e*). Thus, as a general rule, a mortgagee cannot be compelled to produce his security (including title deeds deposited with him) except on payment of his principal, interest and costs (*f*); nor, if he purchases the equity of redemption, can he be compelled to produce the conveyance to him (*g*). Where, however, a mortgagee purchases the equity from a trustee, with notice of the trust, he is not entitled to refuse production of the conveyance to him in an action brought by the *cestui que trust* for redemption and reconveyance (*h*). When any deed, whether security for a mortgage (*i*) or not (*k*), is impeached, it must be produced, but merely charging the person who has it with fraud will not be enough (*i*). In the case of a mortgage executed after December 31, 1881 (*l*):—

"A mortgagor, as long as his right to redeem subsists, shall, by virtue of this Act, be entitled from time to time, at reasonable times, on his request, and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or extracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee."

(ii.) *Documents which relate solely to the deponent's case.*

The party who is seeking discovery has no right to see documents which the deponent swears relate solely to his own case, and contain nothing which tends to

(*c*) *Egremont Burial Board* v. *Egremont Iron, etc., Co.*, 14 Ch. D. 158; *Ingilby* v. *Shafto*, 33 Beav. 31; *Minet* v. *Morgan*, L. R. 8 Ch. 361.

(*d*) *Morris* v. *Edwards*, 15 App. Cas. 309; *Johnson* v. *Whittaker*, 90 L. T. 535.

(*e*) *Ind, Coope & Co.* v. *Emmerson*, 12 App. Cas. 300.

(*f*) *Chichester* v. *Marquis of Donegall*, L. R. 5 Ch. 502.

(*g*) *Greenwood* v. *Rothwell*, 7 Beav. 291.

(*h*) *Smith* v. *Barnes*, L. R. 1 Eq. 65.

(*i*) Cf. *Republic of Costa Rica* v. *Erlanger*, L. R. 19 Eq. 44.

(*k*) *Bassford* v. *Blakesley*, 6 Beav. 131.

(*l*) Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 16 (1).

impeach it or to support the case of his opponent (*m*). As KNIGHT BRUCE, V.-C., said in *Combe* v. *Corporation of London* (*n*):—

"If it be with distinctness and positiveness stated in an answer that a document forms or supports the defendant's title, and is intended to be or may be used by him in evidence accordingly, and does not contain anything impeaching his defence or forming or supporting the plaintiff's title or the plaintiff's case, that document is, I conceive, protected from production, unless the Court sees upon the answer itself that the defendant erroneously represents or misconceives its nature; but where it is consistent with the answer that the document may form the plaintiff's title or part of it, may contain matter supporting the plaintiff's title or the plaintiff's case, or may contain matter impeaching the defence, then I apprehend the document is not protected; nor I apprehend is it protected if the character ascribed to it by the defendant is not averred by him with a reasonable and sufficient degree of positiveness and distinctness."

(iii.) *Communications passing between the deponent and his legal advisers.*

Any document prepared by the deponent to enable his solicitor to advise him; or to obtain an opinion from counsel, is privileged from production (*o*), whether prepared before or after the litigation was contemplated (*p*). And so is any document prepared by the deponent's solicitor with a view to the pending or some previous litigation (*q*), and any opinion of counsel is similarly privileged (*r*).

But when in an action it is alleged with some show of reason that the defendant has been guilty of a crime, or of fraud not amounting to a crime, communications between him and his solicitor relating to the alleged crime, or fraud, or to its subject-matter, are not privileged

(*m*) *Bewicke* v. *Graham*, 7 Q. B. D. 400; *Budden* v. *Wilkinson*, [1893] 2 Q. B. 432; *Frankenstein* v. *Gavin's Cycle, etc., Co.*, [1897] 2 Q. B. 62; *Attorney-General* v. *Newcastle-upon-Tyne Corporation*, [1899] 2 Q. B. 478; cf. *Hope* v. *Brash*, [1897] 2 Q. B. 188.

(*n*) 1 Y. & C. C. C. 631.

(*o*) *Lowden* v. *Blakey*, 23 Q. B. D. 332.

(*p*) *Minet* v. *Morgan*, L. R. 8 Ch. 361.

(*q*) *Calcraft* v. *Guest*, [1898] 1 Q. B. 759; *Ainsworth* v. *Wilding*, [1900] 2 Ch. 315; *Curtis* v. *Beaney*, [1911] P. 181; *O'Rourke* v. *Darbishire*, [1920] A. C. 581; and see *ante*, p. 250.

(*r*) *Sloane* v. *Britain Steamship Co.*, [1897] 1 Q. B. 185; *Lowden* v. *Blakey*, *supra*.

from production merely because they passed between solicitor and client, even though it be not alleged that the solicitor was a party to the alleged crime or fraud (*s*). Once a communication or document is privileged under this head, it is always privileged, whether made with reference to the existing action or to a previous one (*t*). This privilege does not extend to persons who are not barristers or solicitors. "Professional advice in England is confined to legal advice" (*u*).

(iv.) *Documents prepared with a view to litigation.*

All documents which have come into existence for the information of the deponent's solicitor to enable him to prosecute or defend some contemplated or future litigation are privileged (*x*). Thus, transcripts of notes of an interview between deponent's employee and a proposed witness, and a statement of the facts intended for his solicitor's guidance, are privileged (*y*). Nor can an opponent claim to see the other party's opinions, proofs, briefs, draft pleadings, etc. But he can see the indorsement of a brief (*z*). Again, the opponent is, as a rule, entitled to see a copy of a document which was obtained for the purpose of the action, when the original can be put in evidence against him (*a*).

The privilege only exists with regard to documents procured for the purpose of a specific action, and not those procured with a view to litigation generally (*b*). But the

(*s*) *Postlethwaite* v. *Rickman*, 35 Ch. D. 722; *Williams* v. *Quebradu*, [1895] 2 Ch. 751; *R.* v. *Cox*, 14 Q. B. D. 153; *Bullivant* v. *Attorney-General for Victoria*, [1901] A. C. 196.

(*t*) *Bullock* v. *Corry*, 3 Q. B. D. 356; *Branford* v. *Branford*, 4 P. D. 72; *Pearce* v. *Foster*, 15 Q. B. D. 114; *In re Strachan*, [1895] 1 Ch. 439; and see generally on this subject, *ante*, pp. 201–209.

(*u*) *Per* JESSEL, M.R., in *Slade* v. *Tucker*, 14 Ch. D., at p. 827.

(*x*) *Birmingham, etc., Omnibus Co.* v. *L. and N. W. Rail. Co.*, [1913] 3 K. B. 850; *Adam S.S. Co.* v. *London Ass. Corp.*, [1914] 3 K. B. 1256.

(*y*) *Southwark Water Co.* v. *Quick*, 3 Q. B. D. 315.

(*z*) *Walsham* v. *Stainton*, 2 H. & M. 1; *Nichol* v. *Jones*, 2 H. & M. 588.

(*a*) See *Chadwick* v. *Bowman*, 16 Q. B. D. 561; *Wright* v. *Vernon*, 22 L. J. Ch. 447.

(*b*) See *Westinghouse* v. *Midland Rail. Co.*, 48 L. T. 462.

action need not have been commenced, nor need it be the action in which the order for discovery has been made (*c*). *À fortiori*, documents which have come into existence after the commencement of the proceedings to enable the solicitor to advise his client or to obtain evidence or otherwise conduct the case are privileged (*d*).

The documents need not be obtained by the solicitor; it is sufficient that they have been obtained by his direction, even if obtained by the deponent himself (*e*).

But a copy of a document, which, if in the possession of a litigant, would not be privileged from production, is not privileged merely because it has been obtained by his solicitor for the purposes of defence to an action; a collection of documents so obtained will, however, be privileged, especially if the production would give a clue to the solicitor's opinion and advice to his client (*f*). Thus, where four anonymous letters had been received, two by the plaintiff and one each by her counsel and solicitor, the last two were held privileged (*g*); the ground being that they were information received by the counsel and solicitor for promoting their client's case, and that the letters were sent to them in compliance with a request implied by their position. Nothing turned on the letters being anonymous.

When a solicitor holds a document for his client, he cannot, against the will of the client, be compelled to produce it by a person who has an equal interest in it with his client (*h*). But a solicitor cannot refuse to produce a document, if the client himself could not refuse to do so (*i*). The privilege does not extend to communications passing between co-defendants (*k*).

(*c*) *Wheeler* v. *Le Marchant*, 17 Ch. D. 675.
(*d*) *M'Corquodale* v. *Bell*, 1 C. P. D. 471; *Southwark Water Co.* v. *Quick*, *supra*.
(*e*) *Wheeler* v. *Le Marchant*, *supra*; cf. *per* COTTON, L.J., in *Lyell* v. *Kennedy*, 23 Ch. D. 404.
(*f*) *Chadwick* v. *Bowman*, 16 Q. B. D. 561; *Lyell* v. *Kennedy*, 27 Ch. D. 1.
(*g*) *Young* v. *Holloway*, 12 P. D. 167.
(*h*) *Newton* v. *Chaplin*, 10 C. B. 356.
(*i*) *Bursill* v. *Tanner*, 16 Q. B. D. 1.
(*k*) *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196; *Tobakin* v. *Dublin Southern Tramways Co.*, [1905] 2 Ir. R. 58.

(v.) *Documents the production of which would tend to criminate the deponent.*

This subject has already been fully discussed under the head of "Privilege of Witnesses" (*l*). The deponent will not be forced to produce any document which he swears clearly and distinctly will tend to criminate him (*m*). But he cannot refuse to disclose it on that ground, for he must take the objection in his affidavit of documents (*n*).

(vi.) *Documents which, though physically in the possession of the deponent, are the property of a third person who forbids their production.*

Thus, if a solicitor is a party to an action, he will not be forced to produce documents in his possession solely as solicitor for a client (*o*).

The right to deal with documents will warrant an order for their production; and therefore a party will be ordered to produce documents of his which are in the possession of his agent or of his past or present solicitor. But in such a case the order will contain liberty to apply in case the party cannot obtain the documents, lest the order be made a means of oppression (*p*). The fact that the party makes a claim for negligence against his solicitor makes no difference (*p*); and a solicitor's ordinary lien is no defence to an order for production (*q*). Where a contract has been entered into with an agent of a foreign principal and the agent brings an action in his own name, the defendant can indirectly obtain discovery to the same extent as if the principal were a party; for though the Court cannot make an order for discovery on him, it can order that the plaintiff shall not proceed with the action until the principal has done that which, if a party to the

(*l*) See *ante*, p. 192.
(*m*) *Roe* v. *New York Press*, 75 L. T. Jo. 31.
(*n*) *Spokes* v. *Grosvenor Hotel Co.*, [1897] 2 Q. B. 130; *National Association, etc.* v. *Smithies*, [1906] A. C. 434.
(*o*) *Procter* v. *Smiles*, 2 T. L. R. 474; *Ward* v. *Marshall*, 3 T. L. R. 278.
(*p*) *Lewis* v. *Powell*, [1897] 1 Ch. 678.
(*q*) *Hope* v. *Liddell*, 20 Beav. 438.

action, he would have been ordered to do (*r*). But a party cannot be ordered to produce the private books of his agent (*s*) or solicitor (*t*). Where an agent for the party against whom the application is made possesses the documents jointly with other persons, no order to produce will be made, but the party will be compelled to disclose by answer the information which may be obtained by inspecting the documents. And the same rule applies where the documents are in the possession of the party jointly with others. As Lord Cottenham, in *Taylor* v. *Rundell* (*u*), said:—

"It is true that the rule of Court, adopted from necessity, with reference to the production of documents, is, that if a defendant has a joint possession of a document with somebody else who is not before the Court, the Court will not order him to produce it, and that for two reasons: one is, that a party will not be ordered to do that which he cannot or may not be able to do; the other is, that another party not present has an interest in the document which the Court cannot deal with. But that rule does not apply to discovery, in which the only question is, whether as between the plaintiff and the defendant the plaintiff is entitled to an answer to the question he asks; for if he is, the defendant is bound to answer it satisfactorily, or, at least, show the Court that he has done so as far as his means of information will permit."

When privilege is claimed on this ground, the party must satisfy the Court as to the nature of the joint ownership (*x*). The mere fact that a person not before the Court has an interest in documents is no ground for resisting production (*y*); but if a defendant in a suit relating to his own personal transactions has made entries of such transactions in the books of a partnership, he cannot be compelled to produce such books without the consent of his partner (*z*).

Where one partner brought an action in the firm's

(*r*) *Willis* v. *Baddeley*, [1892] 2 Q. B. 324.
(*s*) *Airey* v. *Hall*, 2 De G. & S. 489.
(*t*) *O'Shea* v. *Wood*, [1891] P. 287.
(*u*) Cr. & Ph. 104; cf. *Clinch* v. *Financial Corporation*, L. R. 2 Eq. 271.
(*x*) *Bovill* v. *Cowan*, L. R. 5 Ch. 495.
(*y*) *Kettlewell* v. *Barstow*, L. R. 7 Ch. 693.
(*z*) *Hadley* v. *McDougall*, L. R. 7 Ch. 312; but see *Rattenberry* v. *Monro*, 103 L. T. 560.

name, giving his co-partner, who disapproved of the action, an indemnity against costs, and the latter declined to join in an affidavit of documents, it was held he could be attached for contempt (*a*).

So, too, the secretary of a company cannot as a rule be compelled to produce the documents of his company if the directors do not consent. It is otherwise if the company or directors be the defendants. As PAGE WOOD, V.-C., said, in *Clinch* v. *Financial Corporation* (*b*):—

"But these documents, though in substance they may be the property of the bank, are in the possession or power of the directors, who are the only persons who can give an order for their production. The attempt has often been made in one way or the other to escape the personal order for production, on the ground of the ownership of the documents being in a corporate or partnership body. . . . But it has always been decided that the parties must give all the information in their power, even if the documents be not in their possession in this sense, that they cannot be produced without an order for the purpose, because they are in the joint possession of the directors and others. The Court says, if you have any possession—that is enough. There may be grounds for not producing; but even then you must give discovery."

Merely heading a document "Confidential" will not protect it from discovery (*c*), and consequently letters written to and in the possession of a party to the suit will, if material, be ordered to be produced, even if they are marked "Private and confidential," and the writer objects to their production; but the party claiming production must undertake not to use them for any collateral object (*d*). If documents, whether so marked or not, are confidential, a *primâ facie* case for production must be made out before the Court will order production, but wherever fraud is pleaded, all documents which would throw any light on the alleged fraud ought to be produced (*e*).

(*a*) *Seal* v. *Kingston*, [1908] 2 K. B. 579.

(*b*) L. R. 2 Eq., at p. 273; and see *Balfour* v. *Tillett*, [1913] W. N. 70.

(*c*) *Per* BOVILL, C.J., in *Mahony* v. *National Widows' Life Assurance Fund*, L. R. 6 C. P., at pp. 255, 256.

(*d*) *Hopkinson* v. *Lord Burghley*, L. R. 2 Ch. 447.

(*e*) *Mahony* v. *National Widows' Life Assurance Fund*, L. R. 6 C. P. 252.

(vii.) *Documents the production of which would be prejudicial to public interests.*

This subject has already been dealt with under the heading of Privilege of Documents (*f*). The head of a department alone can claim this privilege (*g*), but it is not necessary that he personally shall claim it, so long as the Court is satisfied that the mind of the responsible person has been brought to bear on the matter (*h*).

So far we have dealt with the practice as to the privilege of documents in actions brought in the King's Bench and Chancery Divisions of the High Court. Closely analogous is the practice as to the inspection of documents under the control of the judges in Lunacy. It was thus stated by LINDLEY, L.J. (*i*) :—

"It is not the practice in lunacy to produce documents in the office to anyone who wants to see them. No one is allowed to see them without an order of one of the masters or of a judge in lunacy. On the other hand, anyone who can satisfy the master or judge that he desires to see such documents for any reasonable and proper purpose is allowed to see them, provided always, if the lunatic is living, that he is not prejudiced thereby. If the lunatic is dead, and the applicant wants to see documents in the custody of the Court, in order to make good a claim to the lunatic's property, such a purpose is *primâ facie* sufficient to induce the Court to allow inspection, even although the request is opposed by a rival litigant. . . . But it is obvious that there are some exceptions to this general rule. The Court would not, under any circumstances, make an order for the inspection of the reports which are confidentially made to the Court by its own medical advisers. . . . The fact that the documents are of such a kind that a litigant who had them could not be compelled to produce them does not, as a matter of law, disentitle his opponents from seeing them. As a matter of law, as distinguished from a matter which the Court ought to consider in the exercise of its discretion, privilege is no bar to inspection in such a case as I am now considering."

PRODUCTION AND INSPECTION OF DOCUMENTS.

If an affidavit of documents be in the proper form, it is as a rule conclusive. No affidavit in

(*f*) See *ante*, pp. 209, 233.
(*g*) *Beatson* v. *Skene*, 5 H. & N. 838.
(*h*) *Kain* v. *Farrer*, 37 L. T. 469; *Hennessy* v. *Wright*, 21 Q. B. D. 509; *In re Joseph Hargreaves*, [1900] 1 Ch. 347.
(*i*) *In re Strachan*, [1895] 1 Ch., at pp. 443, 444.

reply to it will be permitted, nor can the deponent be cross-examined upon it before the trial. The affidavit, therefore, should be full (*k*), and will be strictly construed. If, however, the party seeking discovery believes that the deponent has in his possession documents which are not referred to in the affidavit, he may apply for leave to interrogate him (*l*). The interrogatory must be as to specific documents, and must not be general in its terms. But the more usual course is to proceed under Order XXXI., r. 19A (*m*).

Again, if it can be shown from the affidavit of documents itself, or from the documents disclosed in it, or from any admission on his pleadings, that the deponent has in his possession any material document which he has not disclosed, a further affidavit will be ordered (*n*).

A master at chambers may at any stage of the action order any party to produce such of the documents in his possession or power as the master shall think right; and may deal with such documents, when produced, in such manner as shall appear just (*o*). It is on an application under this rule that the parties obtain a decision as to the validity of a claim of privilege.

Moreover, a master may make an order for the

(*k*) *Per* COTTON, L.J., in *Gardner* v. *Irvin*, 4 Ex. D., at p. 53.

(*l*) See judgment of BRETT, L.J., in *Jones* v. *Monte Video Gas Co.*, 5 Q. B. D. 556; *Hall* v. *Truman*, 29 Ch. D. 307; but see *Morris* v. *Edwards*, 15 App. Cas. 309.

(*m*) See *ante*, p. 549.

(*n*) *Att.-G.* v. *Emerson*, 10 Q. B. D. 191; *Frankenstein* v. *Gavin's Cycle, etc., Co.*, [1897] 2 Q. B. 62; *Kent Coal Concessions* v. *Duguid*, [1910] A. C. 452; *British Association* v. *Nettlefold*, [1912] A. C. 709.

(*o*) Order XXXI., r. 14.

inspection of any document in such place and in such manner as he may think fit, provided such inspection be necessary for disposing fairly of the action, or will save costs (*p*). The party producing any book or document for the inspection of his opponent may seal or cover up any part which he can swear is not material to any issue in the action.

The inspecting party is entitled to make a copy of any document produced to him (*q*). In a proper case (*e.g.*, when one party denies that he wrote an important document which purports to be in his handwriting), the master will order the party in possession of the document to permit his opponent to take photographic or facsimile copies of it—of course, at his own expense (*r*).

The privileged or irrelevant parts of documents which also contain unprivileged relevant matters may be sealed up on production (*s*). Thus, part of a pedigree was allowed to be sealed up on the defendants filing an affidavit that the part so sealed up related to their title and not to the plaintiffs' (*t*); but when parts which might be thus concealed are so interspersed with parts which are producible that sealing up is impossible, then, except in extraordinary cases, no order to produce will be made (*u*). Where such sealing up would interfere with the conduct of his business, or be otherwise oppressive, the party producing documents may simply cover up the

(*p*) Order XXXI., r. 18.

(*q*) *Ormerod* v. *St. Georges*, [1905] 1 Ch. 505; *Bevan* v. *Webb*, [1901] 2 Ch., at p. 74; followed in *Norey* v. *Keep*, [1909] 1 Ch. 561.

(*r*) *Davey* v. *Pemberton*, 11 C. B. (N.S.) 628; *Lewis* v. *Earl of Londesborough*, [1893] 2 Q. B. 191.

(*s*) See *Pardy's Syndicate* v. *Alexander*, [1903] 1 Ch. 191.

(*t*) *Kettlewell* v. *Barstow*, L. R. 7 Ch. 693; and see *Graham* v. *Sutton*, [1897] 1 Ch. 761; *Pickering* v. *Pickering*, 25 Ch. D. 247.

(*u*) *Churton* v. *Frewen*, 2 Dr. & Sm., at p. 394.

irrelevant portions, provided he states upon oath that no relevant portions have been covered up (*x*).

The order usually made is for the party, his solicitors and agents, to inspect the documents. The usual rule of the Court of Chancery was that witnesses were not allowed to inspect documents before the hearing (*y*). But it has been held that a confidential agent whose assistance is necessary to carry on the suit may inspect, although he is a witness in the cause (*z*). If the solicitor deems it necessary in the interests of his client, he may instruct counsel to attend and inspect the documents with him. Where one person was named on the record as the agent of the plaintiffs (a foreign republic) in this country, the defendants were required to produce their documents to a different person, who was stated in the affidavit of the plaintiffs' solicitor to be their agent for the purposes of the suit (*a*). An order may be made on special grounds for persons other than the solicitor or agent of the party to inspect; thus the assistance of surveyors will be allowed in mining actions (*b*), of scientific persons in patent actions (*c*), and of accountants when complicated accounts are involved (*d*).

Again, it must be observed that, where the plaintiff's title to relief is denied by the defendant, the defendant ought not to be compelled to produce all documents, but only those which are necessary or material to the question to be decided at the hearing or trial (*e*).

An inspection ought not, of course, to be granted when it appears to be sought, not *bonâ fide* for the pending action, but to assist the applicant to bring an action against a third person (*f*); nor will a party be permitted

(*x*) *Graham* v. *Sutton*, *supra*.
(*y*) *Boyd* v. *Petrie*, L. R. 3 Ch. 818.
(*z*) *Attorney-General* v. *Whitwood Local Board*, 40 L. J. Ch. 592.
(*a*) *Republic of Costa Rica* v. *Erlanger*, L. R. 19 Eq. 44.
(*b*) *Swansea Rail. Co.* v. *Budd*, L. R. 2 Eq. 274.
(*c*) *Bonnardet* v. *Taylor*, 1 J. & H. 386.
(*d*) *Lindsay* v. *Gladstone*, L. R. 9 Eq. 132.
(*e*) Order XXXI., r. 20; *Rowcliffe* v. *Leigh*, 6 Ch. D. 256; *Verminck* v. *Edwards*, 29 W. R. 189.
(*f*) *Temperley* v. *Willett*, 6 E. & B. 380.

to make public information which he has obtained from the inspection of his opponent's documents (*g*).

The Court will not compel a person, who is not a party to the suit, to produce a document for inspection (*h*), unless he has obtained it from a party to the suit, or holds it in the nature of a trust for such party (*i*). Where such a person holds independently, and by a title paramount to the title of the party, he will not be subject to an order for inspection. In one case, STUART, V.-C., refused to order an executor to produce certain cheques of his testator, which were at the date of the application in the possession of the banker on whom they were drawn (*k*).

Rule 7 of Order XXXVII. provides that—

"The Court or a judge may in any cause or matter at any stage of the proceedings order the attendance of any person for the purpose of producing any writings or other documents named in the order which the Court or judge may think fit to be produced: Provided that no person shall be compelled to produce under any such order any writing or other document which he could not be compelled to produce at the hearing or trial" (*l*).

This rule does not give a litigant the right to obtain discovery which he did not previously possess against persons who are not parties to the action. Its object is to facilitate the production of documents on the hearing of motions, petitions, etc. (*m*). It does not, it is submitted, entitle a party to an order that a third person should produce a material document to him or his solicitor before the trial. The person on whom such an order is made must attend with the specified documents at the time and place named. But he can then raise any legal objection to the production of all or any

(*g*) *Williams* v. *Prince of Wales' Life Assurance Co.*, 23 Beav. 338; cf. *Hopkinson* v. *Lord Burghley*, L. R. 2 Ch. 447.
(*h*) *Cocks* v. *Nash*, 9 Bing. 721.
(*i*) *Doe* v. *Roe*, 1 M. & W. 207.
(*k*) *Bayley* v. *Cass*, 10 W. R. 370.
(*l*) See as to Bankers' Books, *ante*, p. 320.
(*m*) *Elder* v. *Carter*, 25 Q. B. D. 194.

of the documents (*n*). An order under this rule may be made *ex parte* (*o*).

Any party, who fails to answer interrogatories or to discover or produce or allow inspection of documents when ordered so to do, is liable to be attached, and, if a plaintiff, to have his action dismissed for want of prosecution; if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had never pleaded (*p*). But this highly penal provision will only be enforced in the last resort. Before making any application of this kind, the other party should obtain a peremptory order insisting on such discovery being made within a time specified in the order.

The County Courts have, under the County Court Rules, 1903–1920, powers of granting and enforcing inspection and production of documents, in a similar manner to the procedure in the High Court.

(*n*) See *Williams* v. *Frere*, [1891] 1 Ch. 323; *Central News Co.* v. *Eastern News Telegraph Co.*, 53 L. J. Q. B. 236.
(*o*) *Williams* v. *Frere*, *supra*.
(*p*) Order XXXI., r. 21; *Salomon* v. *Hole*, 53 W. R. 588.

CHAPTER III.

PROCURING EVIDENCE.

HAVING thus obtained all the information he can from his opponent, each party begins to search for missing letters and account books, to inspect ancient registers and to obtain certified copies of any material entries which they contain, lest the action should fail for want of some formal piece of proof. He must consider what witnesses he can call, and what documents he can put in evidence, on any issue the burden of proving which lies on him. He must also be ready with evidence to rebut the case of his adversary on the other issues, and also with evidence in aggravation or mitigation of damages.

The success of the action greatly depends upon the care with which the case is prepared before the trial.

ADVICE ON EVIDENCE.

It is the usual practice, as soon as notice of trial has been given, for the solicitor on either side to instruct his junior counsel to advise as to the evidence which it will be necessary to produce at the trial. Every material document in the case should be laid before counsel at this stage, especially the affidavits of documents, the interrogatories and the answers to them, the draft notices

to produce and to inspect and admit documents, and statements of the evidence which can be given by the witnesses whom it is proposed to call at the trial.

In advising upon evidence, counsel must go carefully into every necessary detail. He should first consider whether everything is in proper order for the hearing. The answers to interrogatories or the documents disclosed by the defendant may throw a new light on the matters in dispute. It may be necessary to amend the pleadings or particulars in order that his client's case may be properly presented at the trial; if so, application should be made at once to the master under Order XXVIII., rr. 1–6. Or it may be that the opponent's answers to interrogatories are evasive or insufficient; or that material documents have improperly been omitted from the schedule to his affidavit; in either case an application to the master should be promptly made.

As soon as counsel is satisfied that all preliminaries are in order, and that all material questions are properly raised on the pleadings, he writes an opinion on evidence, in which he states briefly what are the issues of the action and on which party lies the burden of proving each issue, and then advises how each is to be proved or rebutted. He must, in the first place, decide what witnesses his client should *subpœna*. He must next consider what documents will be required for the proof of his client's case, or for the cross-examination of the witnesses called by the other side. The original document must be produced in Court,

if it still exists and is within jurisdiction. If it is produced, it may be necessary to call a witness to prove the handwriting (*a*). If it be not produced, there may be considerable difficulty in obtaining leave to read a copy, and the copy will have to be proved a true copy. Copies of official and other public documents, however, if duly authenticated, have been made admissible in evidence by various statutes (*b*). Counsel must be careful to advise his client to obtain the proper kind of copy which is made evidence by the particular Act. In other cases it may be necessary for him to advise his client to make an application under the Bankers' Books Evidence Act, 1879 (*c*).

Under this Act an order may be made that a party shall be at liberty to inspect and take copies of entries in the books of any bank for the purposes of the litigation, provided the case be one in which the applicant could, before the Act, have compelled the banker to attend at the hearing and produce his books. Such an order can be made, although the account to which the entries relate is kept in the name of a stranger, provided the entries would be evidence in the action. Formerly it was necessary to compel an officer of the bank to attend the trial to produce the books or to give evidence of their contents. But now a copy of an entry in the book of any banker or any company carrying on the business of bankers is made *primâ facie* evidence in all legal proceedings of such entry, and of the matters, transactions, and accounts therein recorded, provided that the book was at the time of the making of the entry one of the ordinary books of the bank, and the entry was made in the usual and

(*a*) See *ante*, p. 238.
(*b*) See *ante*, pp. 214 *et seq.*
(*c*) 42 Vict. c. 11, as extended by 45 & 46 Vict. c. 72, s. 11. See *Emmott* v. *Star Newspaper Co.*, 9 T. L. R. 111.

ordinary course of business, and the book is in the custody or control of the bank. The copy must be verified by the affidavit of a partner or officer of the bank, who must state that the copy has been examined with the original entry and is correct.

Again, where inspection of any business books is applied for, the master may, if he thinks fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries; such affidavit should state whether or not there are in the original book any and what erasures, interlineations, or alterations (*d*). And such copies will be evidence against the party supplying them.

Nor will counsel overlook the value and importance of real evidence. He may consider it advisable for his client or some skilled person on his behalf to inspect premises or things which are in the possession of his opponent. Thus if a landlord alleges that his tenant has left the demised premises in a bad state of repair, both he and the tenant may reasonably desire to send a surveyor over the property to report as to its condition. So, in an action for goods sold and delivered, the purchaser may wish to inspect the bulk and the vendor the sample. In such cases the master has power under Order L., r. 3, upon the application of either party to the action, and upon such terms as may be just, to make an order for the detention, preservation or inspection of any property or thing, which is the subject of the action, or as to which any question may arise therein. A master may also under the same rule authorise any persons to enter upon or

(*d*) Order XXXI., r. 19A (1).

into any land or building in the possession of any party to the action, or authorise samples to be taken, or any observation to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence. Moreover, in a proper case either party can obtain an order that the jury who will try the action shall view the *locus in quo* before the trial.

ATTENDANCE OF WITNESSES.

Attendance in the High Court.

If a party wishes to ensure the attendance of a person as a witness at the trial of an action in the High Court, he must serve him with a *subpœna ad testificandum* (*e*). If the person is required to produce a document, he is served with a *subpœna duces tecum*. A witness who is merely called to produce a document need not be sworn, and in that case he cannot be cross-examined (*f*). He is often called upon to produce the document when some other witness is in the box.

A *subpœna* can be issued without leave of the Court at any stage of the proceedings (*g*), but must not be issued oppressively (*h*) or prematurely (*i*). The High Court has jurisdiction, both in civil and criminal cases, to set aside a *subpœna*, if satisfied that the person served cannot give relevant evidence, and that the *subpœna* has been served for some ulterior purpose. Thus, *subpœnas* served

(*e*) Order XXXVII., rr. 26–34; see also r. 20.
(*f*) *Wood* v. *Mackinson*, 2 M. & R. 273; Cockle, 271.
(*g*) *Raymond* v. *Tapson*, 22 Ch. D. 430.
(*h*) *Steele* v. *Savory*, 8 T. L. R. 94.
(*i*) *London and Globe Finance Corporation* v. *Kaufman*, 69 L. J. Ch. 196.

on Ministers of the Crown were set aside on such ground, although Ministers have no special privilege from the obligation of obeying *subpœnas* (*k*). A *subpœna duces tecum* ought to specify the documents required, and the Court will not enforce a *subpœna* which is too general; but if a person served with a *subpœna* admits that he has the documents required with him, he must produce them (*l*). He may be asked what documents he has with him, and he is bound to answer the question without being sworn, and produce the documents. The witness produces the document to the Court and not to the parties, and the Court decides whether it is to be used or not. The witness can, of course, take any legal objection to producing the document. If a witness attends on a *subpœna duces tecum*, with a document which he properly refuses to produce on the ground of privilege, secondary evidence will be admissible (*m*). If he does not attend on such a *subpœna* or attends and refuses to produce the writing on any other ground but that of privilege, secondary evidence will not be admissible, but the witness will be punishable for contempt (*n*). A person cannot, of course, be compelled by *subpœna* to produce documents which are not in his possession or under his control. Thus, a secretary of a company served with a *subpœna* to produce the books of the company was held not to have disobeyed the *subpœna* by not producing the books, they having been removed from him since the service of the *subpœna* by the board of directors of the company (*o*). A sealed packet may be a "document," and therefore liable to production on a *subpœna duces tecum* (*p*).

(*k*) *R.* v. *Baines*, [1909] 1 K. B. 258.

(*l*) *Lee* v. *Angas*, L. R. 2 Eq. 59; and see *In re Emma Silver Mining Co.*, L. R. 10 Ch. 194.

(*m*) Except in the case of public documents, where the same public policy which renders the original inadmissible also excludes secondary evidence thereof.

(*n*) *R.* v. *Llanfaethly*, 2 E. & B. 940; Cockle, 317.

(*o*) See *R.* v. *Stuart*, 2 T. L. R. 144.

(*p*) *R.* v. *Daye*, [1908] 2 K. B. 333.

Attendance in the Bankruptcy Courts.

A *subpœna ad testificandum* or *duces tecum* may be issued by the Court at the instance of an official receiver, trustee, creditor, debtor, applicant or respondent in any matter (*q*). The names of three witnesses may be inserted in the *subpœna*, which must be duly served.

In order to facilitate the obtaining of information as to the debtor, his dealings, or his property, the Bankruptcy Act, 1914 (*r*), contains the following provisions:—

Section 25. (1) The Court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the Court may deem capable of giving information respecting the debtor, his dealings or property, and the Court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property.

(2) If any person so summoned, after having been tendered a reasonable sum, refuses to come before the Court at the time appointed, or refuses to produce any such document, having no lawful impediment made known to the Court at the time of its sitting and allowed by it, the Court may, by warrant, cause him to be apprehended and brought up for examination (*s*).

If a creditor establishes a *primâ facie* case, he can obtain the examination of the debtor or any other person under the above-mentioned provisions; but the Court must be satisfied that some benefit will result to the estate before it will issue a summons on the application of any person other than an official receiver or a trustee (*t*).

Attendance in the County Courts.

The County Courts Act, 1888 (*u*), provides that—

Section 110. Either of the parties to any action or matter may obtain from the registrar summonses to witnesses, with or without

(*q*) Bankruptcy Rules, 1915, rr. 61–72.

(*r*) 4 & 5 Geo. V. c. 59.

(*s*) The registrar must be personally present during the examination of a witness (*R.* v. *Lloyd*, 19 Q. B. D. 213). The deponent may be cross-examined, but his evidence cannot be contradicted (*In re Scharrer, Ex parte Tilly*, 20 Q. B. D. 518).

(*t*) *Ex parte Nicholson*, 14 Ch. D. 243.

(*u*) 51 & 52 Vict. c. 43.

a clause requiring the production of books, deeds, papers, and writings in the possession or control of the person summoned as a witness [*and provides how such summonses are to be served*].

Section 111. Every person summoned as a witness, either personally or in such other manner as shall be prescribed, to whom at the same time payment or a tender of payment of his expenses shall have been made on the prescribed scale of allowances, and who shall refuse or neglect, without sufficient cause, to appear, or to produce any books, papers, or writings required by such summons to be produced, or who shall refuse to be sworn or give evidence, and also every person present in Court who shall be required to give evidence, and who shall refuse to be sworn or give evidence, shall forfeit and pay such fine, not exceeding ten pounds, as the judge shall direct; and the whole or any part of such fine, in the discretion of the judge, after deducting the costs, shall be applicable towards indemnifying the party injured by such refusal or neglect, and the remainder thereof shall be accounted for by the registrar to the treasurer (*x*).

Where the witness is beyond the jurisdiction of the Court, the summons is sent by the bailiff to the bailiff of the Court of the district in which the witness resides.

Attendance in the winding up of companies for the purpose of giving information.

Section 174 of the Companies (Consolidation) Act, 1908 (*y*), gives the Court, after it has made an order to wind up a company, power to summon before it and examine upon oath, *vivâ voce* or on written interrogatories, concerning the trade, dealings, affairs or property of the company, any officer of the company or person known or suspected to have in his possession any property of the company, or supposed to be indebted to the company, or any person whom the Court may deem capable of giving information concerning the trade, dealings, affairs or property of the company; and the Court may require any such officer or person to produce any books and papers in his custody or power relating to the company. An order under s. 174 may

(*x*) As to bringing up any prisoner or person under any sentence or commitment for trial in order to give evidence, see section 112 of this Act.

(*y*) 8 Edw. VII. c. 69.

be obtained by the liquidator of the company, or by a contributory, on notice to the liquidator, as the latter has the prior right to the order. The making or refusing of the order is entirely in the discretion of the judge (*z*). The witness can refuse to answer questions on the ground that his answers would incriminate him or would involve a breach of professional confidence, and he can appeal to the judge, before whom the examination takes place, against unnecessary or irrelevant questions; the decision of the judge in such a matter is final (*a*).

The examination under this section is a private one, although the Court can authorise any particular person to attend (*b*). The depositions are not evidence against other persons (*c*). But s. 175 of the Act provides for a public examination on oath, before the Court which has made an order for winding up a company, on a day appointed for the purpose, of any person who has taken any part in the promotion or formation of the company, or has been a director or officer of the company, as to the promotion or formation of the company, or as to the conduct of the business of the company, or as to his conduct and dealings as director or officer of the company. The notes of the examination are to be read over to or by, and signed by, the person examined, and may be afterwards used in evidence against him. But it would seem that the statements made by the person examined, even though the notes of his examination are not read over to or by him, and signed by him, may be proved against him by the evidence of a shorthand writer, or any other person who was present (*d*).

But no person can be directed to attend to be examined

(*z*) *In re Imperial Continental Water Corporation*, 33 Ch. D. 314.

(*a*) *In re London Gas Meter Co., Ltd., Ex parte Webber*, 41 L. J. Ch. 145; and *Whitworth's Case*, 19 Ch. D. 118.

(*b*) *In re Norwich Equitable Fire Insurance Co.*, 27 Ch. D. 515; *In re London and Northern Bank, Ltd.*, [1902] 2 Ch. 73; *In re Property Insurance Co., Ltd.*, [1914] 1 Ch. 775.

(*c*) *In re Norwich Equitable Fire Insurance Co., supra.*

(*d*) See *R.* v. *Erdheim*, [1896] 2 Q. B. 260, a decision upon the Bankruptcy Act, 1883.

under this section, until the official receiver has made his further report (if any) under s. 175 (1), stating that, in his opinion, a fraud has been committed by any person in the promotion or formation of the company, or by any director or officer of the company in relation to the company since its formation. It is only upon consideration of such further report that the Court has jurisdiction to direct any person to attend to be examined, and obviously it can only direct a person to attend who is stated in such report to have committed fraud (*e*). In addition the report must state facts showing a basis for the official receiver's opinion sufficient to warrant a judge in calling upon the person, who has in the opinion of the official receiver committed a fraud, to undergo a public examination (*f*). The order can be made *ex parte* (*g*). The person examined "shall" answer all such questions as the Court may put or allow to be put to him; and the Court may put such questions as it thinks fit (*h*). It is doubtful whether the person examined can refuse to answer a question on the ground of privilege, *e.g.*, that the answer would criminate him. Lord HALSBURY has expressed the view that he cannot (*i*).

Attendance in other cases.

The attendance of witnesses before arbitrators is enforced by *subpœna* (*k*). A witness may be brought from a lunatic asylum on a writ of *habeas corpus ad testificandum*, on an affidavit that he is fit to be brought up and is not dangerous (*l*). In the House of Lords, the summons is by an order of the House, signed by the

(*e*) *Ex parte Barnes*, [1896] A. C. 146.
(*f*) *In re Civil, Naval, and Military Outfitters*, [1899] 1 Ch. 215.
(*g*) *In re Trust and Investment Corporation of South Africa*, [1892] 3 Ch. 332.
(*h*) S. 175 (4) and (5).
(*i*) *Ex parte Barnes*, [1896] A. C., at p. 152. As to the costs and expenses of witnesses under the Companies Acts, see *In re Appleton, French and Scrafton, Ltd.*, [1905] 1 Ch. 749.
(*k*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 8.
(*l*) *Fennell* v. *Tait*, 1 C. M. & R. 584.

Clerk of the Parliaments, but in select committees attendance is generally secured by notice from the clerk attending the committee; in the House of Commons, by an Order of the House, signed by the Clerk; in select committees, by an order of the chairman. But if a witness does not attend on such order, he will be summoned to the Bar of the House. Provision is made for the summoning, examination, expenses of and indemnity to witnesses on election petitions by 31 & 32 Vict. c. 125, ss. 31, 32 and 34, and 46 & 47 Vict. c. 51, s. 59.

When a witness is in prison.

An application may be made to a judge of the High Court at chambers, on affidavit, stating the cause of the imprisonment of the witness, whether on civil or criminal process, and that his evidence is material to the applicant, who cannot proceed safely to trial without securing his attendance. The judge, if satisfied with the substance of the application, will then grant the applicant a writ of *habeas corpus ad testificandum* directed to the governor of the gaol in which the prisoner is confined, and commanding him to bring up the prisoner for examination at the trial. A Secretary of State or a judge of the High Court or of a county court has power, on a similar application, to issue a warrant or order to bring up, as a witness in any civil or criminal proceeding, any prisoner in custody on a criminal charge (*m*). An order ought not to be drawn up until the case is in the paper for trial (*n*).

When a witness is out of the jurisdiction.

In this case the process of the Courts does not, as a general rule, reach a witness; and the examination must be by means of a commission or letter of request, the proceedings upon which will be regulated by the law of the country to which it issues (*o*). Where the

(*m*) 16 & 17 Vict. c. 30, s. 9; and see 61 & 62 Vict. c. 41, s. 11.
(*n*) *Jenks* v. *Dillon*, 76 L. T. 591.
(*o*) See *post*, p. 582; *Lumley* v. *Gye*, 3 E. & B. 114.

commission issues to a part of the realm which is subject to different laws from that part in which the commission issues, the commissioner may, by a written notice, signed by him, require the attendance of a witness, and, on his refusing to attend, may apply to the local Courts for an order to compel attendance; and the witness will then be subject to the ordinary penalty for disobeying a *subpœna*, or a writ in the nature of a *subpœna* (*p*). This extends to the examination of witnesses in any of His Majesty's dominions, colonies, or possessions (*q*).

But, by 17 & 18 Vict. c. 34, s. 1, any judge of the High Court in England or Ireland, or of the Court of Session or Exchequer in Scotland, may, at discretion, in any action pending in any such Court, issue a *subpœna ad testificandum*, or *duces tecum*, or warrant of citation, commanding a witness in any part of the United Kingdom to attend the trial; and in default of attendance, after due service of the writ and tender of travelling expenses, the Court from which the writ issued may certify the default to the other superior Courts, and so render the defaulting witness liable to all the penalties which he would have incurred by disobeying a similar writ issued within the jurisdiction in which he resides. This Act does not affect the power of Courts to issue commissions, and its operation is confined to process from the superior Courts. Under this section a rule has been granted to compel a plaintiff resident in Ireland to appear in England as a witness for the defendant (*r*). The jurisdiction can by virtue of s. 16 of the Judicature Act, 1884, be now exercised by a judge in chambers whether the High Court is sitting or not.

Service of subpœna.

The service must be on the witness personally; and is effected by delivering a copy of the writ, and at the same time producing the original. The service must be

(*p*) 6 & 7 Vict. c. 82, ss. 5, 6.
(*q*) 22 Vict. c. 20, s. 1.
(*r*) *Harris* v. *Barber*, 25 L. J. Q. B. 98.

a reasonable time before trial; and, generally, service on the day of trial, even when the witness resides in the town, is insufficient, unless the witness receives the service without objection (*s*).

During his attendance the witness is privileged from arrest on civil process, and he is allowed a reasonable time for going to and returning from Court (*t*). If he is arrested during that time, it is a contempt of Court (*u*). The privilege does not extend to an arrest on criminal process (*x*), nor where the witness is retaken by his bail, after he has finished his evidence. The privilege exists whether the witness's attendance be compulsory or voluntary (*y*), but not in cases in which the witness attends rather as an unprofessional adviser than as a solicitor or witness (*z*).

A witness may be arrested for a contempt of Court if the contempt is in its nature or by its incidents criminal, but not where the contempt consists in the breach of an order of a personal description if the breach is not accompanied by criminal incidents, *i.e.*, where the arrest is mere process, privilege exists; where it is punitive or disciplinary, privilege does not exist (*a*). So, as a process of commitment for non-payment of rates is a mere civil process to enforce payment, a witness cannot be arrested thereunder (*b*).

Penalty for non-attendance.

If a witness does not attend on his *subpœna*, he may be proceeded against in either of two ways: (1) He may be sued in an action for damages by the injured party (*c*),

(*s*) *Barber* v. *Wood*, 2 M. & R. 172; *Maunsell* v. *Ainsworth*, 8 Dowl. 869.
(*t*) *Montague* v. *Harrison*, 3 C. B. (N.S.) 292.
(*u*) *Kimpton* v. *London and North-Western Rail. Co.*, 9 Ex. 766.
(*x*) *In re Douglas*, 3 Q. B. 825.
(*y*) *Meekins* v. *Smith*, 1 H. Bl. 636.
(*z*) *Jones* v. *Marshall*, 2 C. B. (N.S.) 615.
(*a*) See *In re Freston*, 11 Q. B. D. 545, approving *Long Wellesley's Case*, 2 Russ. & M. 639; and see *In re Dudley*, 12 Q. B. D. 44.
(*b*) *Hobern* v. *Fowler*, 62 L. J. Q. B. 49.
(*c*) *Pearson* v. *Isles*, 2 Doug. at p. 561.

but actual damage must be proved; or (2) he may be attached for contempt of Court; on the motion for an attachment, it must be shown distinctly on affidavit that the witness was served; that his expenses were paid or tendered to him at the time of service; and that everything reasonable has been done to secure his attendance (*d*).

Where there is disobedience to a *subpœna duces tecum*, the Court has jurisdiction to enforce obedience by attachment, even though the disobedience is not wilful (*e*).

Expenses of Witnesses.

In criminal proceedings, a witness for the prosecution is not entitled absolutely to his expenses, and he cannot refuse to attend or give evidence on the ground that his expenses have not been tendered or paid; but in Courts of final jurisdiction they are generally allowed by the Court by statute (*f*). When the witness lives out of the jurisdiction of the Court, and in a distinct part of the United Kingdom, as in Scotland or Ireland, by 45 Geo. III. c. 92, s. 3, he is not bound to appear to give evidence in a criminal prosecution, unless his reasonable expenses are paid or tendered to him at the time when he is served with the *subpœna* (*g*). In any other case a witness, *subpœnaed* on a criminal trial, is bound to attend without any tender of expenses, and will be liable to attachment for non-attendance; although, if it appeared that he could not defray the expenses of his journey, the Court would probably refuse to attach him.

In civil proceedings, "such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence and the attendance of witnesses are to be allowed" (*h*). No witness, although served with

(*d*) *Garden* v. *Cresswell*, 2 M. & W. 319.
(*e*) *R.* v. *Daye*, [1908] 2 K. B. 333.
(*f*) See Costs in Criminal Cases Act, 1908 (8 Edw. VII. c. 15).
(*g*) *R.* v. *Brownell*, 1 A. & E., at p. 602.
(*h*) Order LXV., r. 27 (9).

a *subpœna*, is bound to attend (*i*) at the trial, unless his reasonable expenses are tendered to him when he is served, or a reasonable time before trial. The sum tendered should be sufficient to compensate him for his travelling expenses and subsistence during the attendance (*k*). A witness will be entitled to his expenses although a party to the cause, if he is a material and necessary witness (*l*). If the witness is a married woman, her expenses should be tendered to her and not to her husband. If a witness is *subpœnaed* by both parties, he is entitled to be paid all his expenses by the party calling him before giving evidence (*m*). The witness may waive his right to demand payment of his expenses, either expressly or by implication (*n*). If a witness appears on his *subpœna* in a civil proceeding, he will not be compellable to give evidence until his reasonable expenses have been paid, or tendered by the party who *subpœnas* him (*o*). If he does not arrive before a cause has been referred, he will be entitled to costs in the reference, but not in the cause (*p*).

A successful party may pay a witness his costs, and recover them from the defeated party (*q*); but the costs of an immaterial witness who has been rejected by a judge or arbitrator cannot be claimed as between party and party (*r*). The reasonable expenses of qualifying a witness to give evidence may now be allowed (*s*). If the witness, after being *subpœnaed*, is not required to attend, and has incurred no expense, he must refund the money paid to him (*t*).

(*i*) See *ante*, pp. 571 *et seq.*
(*k*) *Dowdell* v. *Australian Royal Mail Co.*, 3 E. & B. 902.
(*l*) *Howes* v. *Barber*, 18 Q. B. 588.
(*m*) *Per* PARKE, B., in *Allen* v. *Yoxall*, 1 Car. & K. 316.
(*n*) *Newton* v. *Harland*, 1 Man. & G. 956.
(*o*) *Ibid.*
(*p*) *Fryer* v. *Sturt*, 16 C. B. 218.
(*q*) *Hale* v. *Bates*, E. B. & E. 575.
(*r*) *Galloway* v. *Kenworth*, 15 C. B. 228
(*s*) *Mackley* v. *Chillingworth*, 2 C. P. D. 273.
(*t*) *Martin* v. *Andrews*, 7 E. & B. 1.

COMMISSIONS AND LETTERS OF REQUEST.

It sometimes happens that, when the solicitor for a litigant seeks to serve a necessary witness with a *subpœna*, he finds that his intended witness is too old or too ill to attend the trial, or will leave the country before the trial, or is already absent abroad. In the first two cases the person who needs his evidence must at once apply for "a commission" to take his deposition before the trial. Some barrister or solicitor is appointed commissioner; he goes to the bedside or other place where the witness is, accompanied by the parties or their representatives. The witness is sworn and tells his story, is cross-examined and re-examined. The commissioner takes down all the evidence and any objections to any part of it. This he then reads over to the witness, and both he and the witness sign it. As soon as this is done the record becomes a deposition and is subsequently filed in Court. It may be necessary to apply to postpone the trial while this is taking place.

But there is more difficulty if the witness be already abroad so that he cannot be served with a *subpœna*. In some cases an order will be made for a commission as above described, and then the evidence of the witness will be taken abroad before a commissioner or examiner appointed by the English Court or judge, and the depositions taken before him can be used at the trial in England, unless the witness can be induced to return to England.

But several foreign governments object to com-

missions being used and to examiners administering oaths to witnesses within their dominions. Hence now the Foreign Office, at the request of the Lord Chancellor or the Lord Chief Justice, frequently sends through diplomatic channels "a letter of request" addressed to the tribunal of such other country, asking the judges of that tribunal to order the required evidence to be taken and remitted to the English Court. This plan is found to be cheaper than the writ of commission, which, however, is still employed for the examination of witnesses in the United States of America, and occasionally in our Colonies.

The practice as to commissions is governed by Order XXXVII., rule 5 of which is as follows:—

"The Court or a judge may, in any cause or matter (*u*) where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before the Court or judge or any officer of the Court, or any other person, and at any place, of any witness or person, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a judge may direct."

Under this rule it has been held that orders will be made where "necessary for the purposes of justice," *i.e.*, in the interests of all parties to the litigation, and not merely in the interest of the applicant (*x*). The order may be made *ex parte*, but in such a case it is liable to be discharged if it can be shown to be improper as not being necessary for the purposes of justice (*y*). The plaintiff himself will not, as a rule, be allowed to give his evidence abroad on commission; it should be given before the jury here (*z*). But a defendant, if

(*u*) This does not include an arbitration under an agreement (*In re Shaw and Ronaldson*, [1892] 1 Q. B. 91).
(*x*) *Berdan* v. *Greenwood*, 20 Ch. D. 764, n.
(*y*) *Bidder* v. *Bridges*, 26 Ch. D. 1.
(*z*) *Keeley* v. *Wakley*, 9 T. L. R. 571.

resident abroad, will be allowed this indulgence (*a*). No order will be made either for a commission or letters of request, if it can be shown that the witnesses could be brought to England without much greater expense, or that witnesses now in England could give the same evidence (*b*). Sometimes the mere delay, which will thus necessarily be caused, is a sufficient reason for refusing the application. A defendant will obtain a commission or letters of request more readily than a plaintiff (*c*). The affidavit filed in support of the application must state the name of at least one witness whom it is desired to examine (*d*), and the general nature of the evidence he is expected to give (*e*).

When the ground for the application is the age of the witnesses, those above seventy-five will be examined as a matter of course; as to those between seventy and seventy-five, it will depend on the nature of the evidence they can give, and the number of other witnesses who can give similar evidence (*f*), but age alone is not a sufficient ground where the witness is under seventy. If there is only one witness who can depose to an important fact, an order will, following the practice of the Court of Chancery, be made to examine such witness (*g*). It should be observed, that Order XXXVII., r. 5, does not apply to cases in which the parties have agreed that the evidence in an action shall be taken by affidavit, and it afterwards transpires that one of the proposed witnesses will not make an affidavit (*h*).

If the witness is in England, his examination will, unless the Court or a judge shall otherwise direct, be taken before one of the examiners of the Court (*i*). This

(*a*) *New* v. *Burns*, 64 L. J. Q. B. 104; *Ross* v. *Woodford*, [1894] 1 Ch. 38.
(*b*) *Ehrmann* v. *Ehrmann*, [1896] 2 Ch. 611.
(*c*) *Ross* v. *Woodford*, [1894] 1 Ch. 38.
(*d*) *Howard* v. *Dulau & Co.*, 11 T. L. R. 451.
(*e*) *Barry* v. *Barclay*, 15 C. B. (N.S.) 849.
(*f*) *Bidder* v. *Bridges*, 26 Ch. D. 1.
(*g*) *Shirley* v. *Earl Ferrers*, 3 P. Wms. 77.
(*h*) *Nadin* v. *Bassett*, 25 Ch. D. 21.
(*i*) Order XXXVII., r. 39.

rule, however, does not affect the practice as to examinations in the Admiralty Division. In cases where the witness is not examined before one of the examiners of the Court, a special examiner has to be appointed, who is usually, though not necessarily, a barrister. All persons interested have a right to be heard on the question who shall be appointed special examiner, and if they cannot agree the judge appoints (*k*). A mere witness, however, has no voice in the matter (*l*).

When the witness is to be examined abroad (and a letter of request is not resorted to), a special examiner has of course to be appointed (*m*); he need not be a barrister. In one case the British Minister at Teheran was appointed (*n*), but the Court will not appoint a shorthand writer as a commissioner to take evidence in a divorce suit (*o*). Order XXXVII., r. 6A, authorises the Court or a judge to issue a letter of request to the judges of a foreign Court to examine witnesses for the purposes of an English action.

This procedure is now very generally adopted, and, in some cases, it is the only procedure that is feasible. But letters of request should be issued for the examination of witnesses only; they should not be applied for merely to gain inspection of documents in a foreign country (*p*).

An application for a commission to take evidence abroad will be refused where there has been undue delay (*q*), or where it is not made *bonâ fide;* and therefore, where the Court was satisfied that the reason alleged for the plaintiff not coming to England was a pretence, and that the real reason was that he desired to avoid cross-examination in Court, a commission to take his evidence abroad was refused (*r*). In a later

(*k*) *In re Smith, Knight & Co.*, L. R. 8 Eq. 23.
(*l*) *In re Contract Corporation*, L. R. 13 Eq. 27.
(*m*) *Ongley* v. *Hill*, [1874] W. N. 157.
(*n*) *Banque Franco-Égyptienne* v. *Lütscher*, 28 W. R. 133.
(*o*) *Bicknell* v. *Bicknell*, [1908] W. N. 97.
(*p*) *Cape Copper Co.* v. *Comptoir d'Escompte de Paris*, 38 W. R. 763.
(*q*) *Steuart* v. *Gladstone*, 7 Ch. D. 394.
(*r*) *Berdan* v. *Greenwood*, 20 Ch. D. 764, n.

case, however, where the Court of Appeal was of opinion that it was not necessary for the purposes of justice that the plaintiffs should be examined in Court, a commission was granted to examine them in America, where they resided (*s*). In another case the Court of Appeal qualified an order appointing a commission to take the plaintiff's evidence in New Zealand, where he resided, by inserting a proviso that the depositions of the plaintiff were not to be read if the defendant required him to appear at the trial to be examined and cross-examined (*t*). No general rule can be extracted from the cases, but it seems that the Court will in each case be guided by the nature of the action, the importance to be attached to the plaintiff's cross-examination, and the circumstances under which it is asked to dispense with the plaintiff's personal attendance in Court, in deciding whether it will or will not grant a commission to take his evidence abroad. The matter is entirely one within the discretion of the Court (*u*).

With regard to a proposed witness who is abroad, the Court must in all cases be satisfied that he can give material evidence before it will issue a commission (*x*) or letters of request, and the evidence must be directly material to the case and not merely evidence which incidentally might be useful for the purpose of corroborating a witness or the like (*y*). Subject to this, the rule is that a commission will issue if the applicant satisfies the Court that it is impracticable or unreasonable to bring the witness to England for the trial. In one case an application for a commission to examine an important witness in America was refused by the Court of Appeal on the ground that there was not enough to show that the witness could not be brought

(*s*) *Armour* v. *Walker*, 25 Ch. D. 673.
(*t*) *Nadin* v. *Bassett*, 25 Ch. D. 21.
(*u*) *Coch* v. *Allcock*, 21 Q. B. D. 178; *Armstrong* v. *Armstrong*, [1892] P. 98.
(*x*) *Langen* v. *Tate*, 24 Ch. D. 522; but see *Valentine* v. *Valentine*, [1901] P. 283; *Gribbon* v. *Gribbon*, 24 T. L. R. 160.
(*y*) *Ehrmann* v. *Ehrmann*, [1896] 2 Ch. 611.

or would not come to England (*z*), COTTON, L.J., observing:—

"In a case of this sort, where it is important that the witness should be examined in Court, a heavy burden lies on the party who wishes to examine him abroad to show clearly that he cannot be reasonably expected to come here. On that point the plaintiff has failed. In my opinion there is not sufficient evidence to satisfy me that this witness cannot be brought here or will not come here. It is true we are told he is in the service of some company, but we do not know what is the character of his occupation, or whether he would not be able, at comparatively small expense, to leave for a time his position there and come over to this country."

A commission is sometimes granted to examine witnesses in a foreign country for the purpose of proving what is the law of that country on any point. The granting of such commission will depend entirely on the question whether competent witnesses can be called to prove the law in question at the trial in England. If they can be called, the commission will be refused (*a*). If they probably cannot, the commission will generally be granted (*b*), but the matter is entirely within the discretion of the Court (*c*).

Any objection to the evidence taken before a commission ought to be made at the time the evidence is taken, and not afterwards, and this is especially the case with an objection which could be removed at the time (*d*). Thus, where copies of certain documents and answers of the witnesses with regard to such copies were received by the commissioners without objection by the defendant at the time, and the copies were appended to the depositions, it was held that the defendant could not afterwards object to such copies being used in evidence (*e*).

Where an order has been made for the examination of a witness under Order XXXVII., r. 5, it is not an order on him to attend for examination, and therefore, if he is unwilling to attend, he must be served with a *subpœna*.

(*z*) *Lawson* v. *Vacuum Brake Co.*, 27 Ch. D. 137.
(*a*) *The M. Moxham*, 1 P. D. 116.
(*b*) *Armour* v. *Walker*, 25 Ch. D., at p. 677.
(*c*) *Coch* v. *Allcock*, 21 Q. B. D. 178.
(*d*) *Richards* v. *Hough*, 51 L. J. Q. B. 361.
(*e*) *Robinson* v. *Davies*, 5 Q. B. D. 26.

If he then fails to attend, or attends and refuses to be sworn, or refuses to answer a lawful question, the party requiring his evidence must apply to the Court or a judge under Rule 13. In such a case the Court will order a recalcitrant witness to attend at his own expense (*f*), and can make him pay the costs of the order (*g*). A witness who refuses to answer a lawful question when ordered so to do by the Court or a judge can be committed for contempt of Court, but an examiner has no power to compel a witness to answer. All that he can do is to take down the question and the objection for the purpose of the matter being brought before the Court or a judge by the party who desires to have the witness's answer (*h*).

A commission may be issued to the judges of any foreign Court if willing to act (*i*). So a commission may issue to the judges of the High Court of Justice in England, and of the Court of Session in Scotland, and of any Supreme Court in any of His Majesty's colonies or possessions abroad, and to any judge in any such colony or possession appointed for the purpose by Order in Council (*k*).

Every person examined as a witness under such a commission, who upon his examination wilfully gives any false evidence, is deemed to be guilty of perjury (*l*). He can claim the privilege of an ordinary witness with regard to answering questions and producing documents (*m*).

The attendance of witnesses before a special examiner can be enforced by the Court having jurisdiction where the examination is to take place; and in such case it is the duty of such Court, and not of the Court that appoints the special examination, to determine what witnesses are

(*f*) *Steuart* v. *Balkis Co.*, 32 W. R. 676.
(*g*) Order XXXVII., r. 15.
(*h*) *Ibid.*, r. 14.
(*i*) *Fischer* v. *Sztaray*, E. B. & E. 321. Now, however, the practice is to issue a letter of request: *ante*, p. 583.
(*k*) See Evidence by Commission Act, 1859 (22 Vict. c. 20), s. 1, and Order XXXVII., rr. 54–59. The Court may "nominate some fit person to take" the examination in question (48 & 49 Vict. c. 74, s. 2).
(*l*) See the Perjury Act, 1911 (1 & 2 Geo. V. c. 6), s. 1.
(*m*) 22 Vict. c. 20, s. 4.

to be summoned, and what documents they are to produce, as well as to decide all questions of privilege on the evidence which may arise in the examination (*n*). A single commissioner must administer the oath to himself, and should be expressly authorised so to do by the commission (*o*).

Section 5 of the Evidence by Commission Act, 1843 (*p*), provides machinery for the execution in any part of the United Kingdom of commissions issued in any other part (*q*).

The English Courts will upon request take evidence here for Courts in foreign countries (*r*).

NOTICES TO PRODUCE AND TO ADMIT.

The notice to produce, and the notice to inspect and admit, documents must also be carefully prepared. The importance of these notices has already been pointed out. Unless one party has given to his opponent express notice to produce a particular document which is in the latter's possession, he cannot give any secondary evidence of its contents. Unless one party has given notice to his opponent to inspect and admit the documents in his own possession, the opponent will not admit them, and then they must be strictly proved at the trial. If, after notice to admit, the opponent refuses to admit the handwriting, he will probably, even though he win the action, have to pay the costs of proving this document. But the party in possession of the document, even if successful, will not be allowed

(*n*) *Campbell* v. *Attorney-General*, L. R. 2 Ch. 571.
(*o*) *Wilson* v. *De Coulon*, 22 Ch. D. 841.
(*p*) 6 & 7 Vict. c. 82.
(*q*) As to the jurisdiction conferred by this Act, see *Burchard* v. *Macfarlane*, [1891] 2 Q. B. 241.
(*r*) Foreign Tribunals Evidence Act, 1856 (19 & 20 Vict. c. 113); Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 24; and see Order XXXVII., rr. 54–58, 60.

the costs of proving it unless he served on his opponent notice to admit it, and so gave him the opportunity of saving the expense (*s*).

The service of a notice to produce is then an essential preliminary to the admissibility of secondary evidence of its contents, whenever the document is in the possession of the opponent. But a party does not insure the production of the original document at the trial merely by giving his opponent notice to produce it. The opponent may disregard the notice and refuse to produce the document at the trial, although such conduct will be matter for adverse comment. If, therefore, a party has no copy of a document, which is of importance to his case, he should do something more than merely give a notice to produce it. As a rule, it will be sufficient to serve the opponent with a *subpœna duces tecum* to produce the particular document But if the document is essential to the proof of a party's case, he should apply for an order compelling his opponent to produce the original at the hearing. The Court can, under Order XXXI., r. 14, compel the production by a party of any document at the trial, and will, if necessary, adjourn the case to enable it to be produced.

To entitle a party to give secondary evidence of a document, it is not enough for him duly to serve notice to produce it on his opponent; he must also prove, or at least raise, a reasonable presumption that the original is in the hands of the adverse party or of a third person in privity with him (*t*). Slight evidence of this fact will be sufficient, when the document naturally, necessarily

(*s*) Order XXXII., r. 2.
(*t*) *Sharpe* v. *Lamb*, 11 A. & E. 805.

or probably might be expected to be in the custody, or under the control, of the adverse party. Thus, it has been presumed that a bankruptcy certificate came into the hands of a bankrupt who was proved to have applied for it, and to have been charged for it by his solicitor (*u*). Generally, where documents have been traced into a party's possession, it lies upon him to show what has become of them, before he can object, after notice to produce, to the substitution of secondary evidence (*x*); and where there is a privity of title between the adverse party and a third person who holds the original, the former is equally compellable to produce. In such a case the question is, whether the custody was virtually, although not actually, the custody of the adverse party; or whether he had such a control over the holding by the third party as made it virtually a personal holding. Thus, generally, where the document is in the possession of an agent, he may either be served with a *subpœna duces tecum*, or the principal may be served with notice to produce. Where a notice was given to an owner of a vessel to produce a document which appeared to be in the possession of the captain (*y*); where it was given to the drawer to produce a cheque which was proved to have been delivered to the drawer's banker (*z*); and to a sheriff to produce a warrant which had been returned to the under-sheriff (*a*), secondary evidence has been received; but where the possession was independent of the adverse party, as where he had assigned a lease (*b*); or where the writing was held as a security by a third party (*c*); or where it has been traced by a party satisfactorily into the possession of a stranger with whom he is unconnected, and over whom he has no control, a litigant will not be affected by notice unless he has wilfully parted with the document after receiving the notice (*b*).

(*u*) *Henry* v. *Leigh*, 3 Camp., at p. 502.
(*x*) *R.* v. *Thistlewood*, 33 How. St. Tr., at p. 757.
(*y*) *Baldney* v. *Ritchie*, 1 Stark. 338.
(*z*) *Partridge* v. *Coates*, Ry. & M. 156.
(*a*) *Taplin* v. *Atty*, 3 Bing. 164.
(*b*) *Knight* v. *Martin*, Gow, 103.
(*c*) *Parry* v. *May*, 1 M. & Rob. 279.

A party may produce an original document at any time when secondary evidence is tendered; and then the latter becomes inadmissible. If there is any question as to the originality of the document, such question is for the judge (*d*); but where the existence of a duly stamped document is denied upon the pleadings, and the plaintiff, after giving notice to produce, tenders a copy of it, the judge cannot hear evidence to decide the question of the existence of the stamped original as a question preliminary to that of the admissibility of the copy, because he would be thereby determining an issue which is in the province of the jury (*e*).

A notice to produce might formerly have been given to the adverse party or his agent, either verbally or in writing (*f*); but in civil cases it must now be given in writing (*g*). It may be served either on the party or on his solicitor (*h*), and it will be sufficient to leave it with a servant at the residence of the former, or with a clerk at the office of the latter (*i*). If a new trial is ordered, fresh notices to produce are not necessary (*k*).

The notice to produce need not be minutely descriptive, and the Courts will not entertain frivolous or technical objections to its validity, if it points out, with sufficient distinctness, to the adverse party the documents which he is required to produce (*l*). Notices to produce "all letters written by the plaintiff to the defendant, relating to the matters in dispute in the action" (*m*); and "all letters written to and received by the plaintiff between the years 1837 and 1841, both inclusive, by and from the defendants, or either of them, or any person on their behalf; and also all books, papers, etc., relating to the

(*d*) *Boyle* v. *Wiseman*, 11 Ex. 360.
(*e*) *Stowe* v. *Querner*, L. R. 5 Ex. 155.
(*f*) *Smith* v. *Young*, 1 Camp. 439; *Suter* v. *Burrell*, 2 H. & N. 867.
(*g*) By Order XXXII., r. 8, which also prescribes a form of notice: see R.S.C., Appendix B., No. 14.
(*h*) *Hughes* v. *Budd*, 8 Dowl. 315.
(*i*) *Evans* v. *Sweet*, Ry. & M. 83.
(*k*) *Hope* v. *Beadon*, 17 Q. B. 509.
(*l*) *Lawrence* v. *Clark*, 14 M & W. 250.
(*m*) *Jacob* v. *Lee*, 2 M. & Rob. 33.

subject-matter of this cause" (*n*); and also "all accounts relating to the matters in question in this cause" (*o*); have been held sufficient notice to produce any document reasonably included in the description. Notice to produce a letter purporting to enclose an account has been held sufficient notice to produce the account (*p*).

The notice ought to be given within a reasonable time before the trial comes on; and it will be for the judge to determine, in the circumstances of the case, whether the notice has been served within such reasonable time (*q*).

Where the adverse holder is abroad, or beyond the jurisdiction of the Court, and leaves his solicitor to conduct his case, it will be presumed that he has also left with him all papers naturally connected with his case; and the Courts, under such circumstances, have been inclined to maintain the validity of a notice to the solicitor (*r*); but the circumstances must be such as to support a supposition that the papers are producible, and the notice must be sufficient. Thus, a three days' notice to produce letters written by a defendant to his partners in New South Wales, was held sufficient, on its appearing that there had been litigation between the same parties some years previously, for the purposes of which it was reasonable to suppose that the letters must have been remitted to England (*s*).

If a party, on being served with notice to produce, states that the document does not exist, secondary evidence will be admissible, and the adverse party cannot object to the lateness of the notice (*t*).

An affidavit by the solicitor, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, is in all

(*n*) *Morris* v. *Hanser*, 2 M. & Rob. 392.
(*o*) *Rogers* v. *Custance*, 2 M. & Rob. 179.
(*p*) *Engall* v. *Bruce*, 9 W. R. 536.
(*q*) *Per* PARKE, B., in *Lloyd* v. *Mostyn*, 10 M. & W., at p. 483; and see *Dwyer* v. *Collins*, 7 Ex. 639; Cockle, 314; *Byrne* v. *Harvey*, 2 M. & Rob. 89; *R.* v. *Hawkins*, 2 Car. & K. 823.
(*r*) *Bryan* v. *Wagstaff*, Ry. & M. 327.
(*s*) *Sturge* v. *Buchanan*, 10 A. & E. 598.
(*t*) *Foster* v. *Pointer*, 9 C. & P. 718.

cases sufficient evidence of the service of the notice, and of the time when it was served (*u*). Sufficient evidence in this rule means *primâ facie* and not conclusive evidence (*x*).

Notice to produce is unnecessary—

(1) When a party holds a duplicate original, or a counterpart of his adversary's document (*y*). Such duplicate or counterpart must not be a mere copy, but in all respects of equal and co-extensive character and validity with the adversary's document. In such a case it is receivable as being itself primary evidence.

(2) When the nature of the case and proceedings sufficiently inform the adverse party that he will be required to produce the document. Thus, in an action of trover for a bond or other instrument (*z*), in an action on a solicitor's signed bill of costs (*a*), or on an indictment for stealing a document (*b*), the plaintiff or prosecutor may give secondary evidence without proving notice to produce.

But where on an indictment for perjury, the prisoner had sworn that a certain draft did not exist, and the materiality of its existence depended on its contents and certain alleged alterations in it, it was held that no parol evidence was admissible, either of its existence or of its contents, without notice to produce (*c*).

The general rule stated above is subject to several special limitations. Thus, in forgery, the prosecutor must give notice to the prisoner to produce the original instrument (*d*); in arson, for setting fire to a dwelling-house with intent to defraud an insurance company, notice must be given to produce the policy (*e*). In civil cases, in an action on a cheque or a bill, if the defendant

(*u*) Order XXXII., r. 8.
(*x*) See *Barraclough* v. *Greenhough*, L. R. 2 Q. B. 612.
(*y*) *Colling* v. *Treweek*, 6 B. & C., at p. 398.
(*z*) *Scott* v. *Jones*, 4 Taunt. 865.
(*a*) *Colling* v. *Treweek*, 6 B. & C. 394.
(*b*) *R.* v. *Aickles*, 1 Leach, 294; and see also *Marshall* v. *Ford*, 99 L. T. 796; *R.* v. *Elworthy*, L. R. 1 C. C. R., at p. 105.
(*c*) *R.* v. *Elworthy*, L. R. 1 C. C. R. 103.
(*d*) *R.* v. *Halworth*, 4 C. & P. 254.
(*e*) *R.* v. *Ellicombe*, 5 C. & P. 522.

does not traverse the making or acceptance, the plaintiff need not produce without notice (*f*).

(3) When the document is itself a notice (*g*), *e.g.*, a notice to quit, a notice of action, a notice of dishonour of a bill, or a notice to produce (*h*).

The principle of this rule is that the service of the original notice is in itself a sufficient notice to produce it at the trial if required. It does not apply where the notice has been given to one who is not a party to the action, nor where it contains the terms of a contract; as where a carrier, relying upon a notice served on the plaintiff to limit his liability, was held bound to give notice to produce it (*i*). This exception has been extended to other formal documents besides notices. Thus, where a person was charged with exceeding the speed limit for motor cars, a constable gave evidence that the name and address in the licence were those of the person charged. No notice to produce the licence had been given, but it was held that the evidence was admissible (*k*). So it has been held that it is unnecessary to serve upon the prisoner a notice to produce the notice which is required by the Prevention of Crime Act, 1908, to be served upon a person whom it is intended to indict for being a habitual criminal (*l*).

(4) When a party or his solicitor is shown to have an original with him in Court, and refuses to produce it, secondary evidence will be received, notwithstanding the want of a notice to produce (*m*).

(5) When the adverse party has admitted the loss of the original; or when it is absolutely impossible or highly inconvenient to produce it in Court, as in the case of a mural inscription (*n*), but not a removable and portable notice or inscription (*o*).

(*f*) *Goodered* v. *Armorer*, 3 Q. B. 956.
(*g*) *Philipson* v. *Chase*, 2 Camp. 111.
(*h*) *Colling* v. *Treweek*, 6 B. & C. 394.
(*i*) *Jones* v. *Tarleton*, 9 M. & W. 675.
(*k*) *Marshall* v. *Ford*, 99 L. T. 796.
(*l*) *R.* v. *Turner*, [1910] 1 K. B. 346; 8 Edw. VII. c. 59, s. 10.
(*m*) *Dwyer* v. *Collins*, 7 Ex. 639; Cockle, 314.
(*n*) *Bartholomew* v. *Stephens*, 8 C. & P. 728; see *Mortimer* v. *M'Callan*, 6 M. & W. 58; Cockle, 321.
(*o*) *Jones* v. *Tarleton*, 9 M. & W. 675.

(6) Merchant seamen (*p*) are permitted to prove orally an agreement with the master of a ship, without producing the original, or giving notice to produce it.

Lastly, although a party has been duly served with a proper notice to produce a document, it will still be open to him at the trial to object to its being read on the ground that it is wholly irrelevant, or is marked "without prejudice" (*q*), and also on any ground on which he might have refused to produce to his opponent before the trial a document included in the schedule to his Affidavit of Documents (*r*).

(*p*) Merchant Shipping Act, 1894, s. 123.
(*q*) See *ante*, p. 252.
(*r*) See *ante*, pp. 553 *et seq.*

CHAPTER IV.

TRIAL OF A CIVIL ACTION.

In a civil case, as soon as the jury, if there is one, has been sworn and the pleadings opened (*a*), the counsel for the plaintiff usually, but not always, proceeds to make his opening speech. Even if the defendant does not appear, the plaintiff must briefly open and prove his case. If the defendant appears and the plaintiff does not, the defendant, if he has no counterclaim, is entitled to judgment dismissing the action, even though the burden of proof be on him (*b*). If he has a counterclaim, he must either withdraw it or proceed to prove it.

If, however, both parties appear, the one on whom the burden of proof rests should begin. But practically the defendant never begins unless the plaintiff has nothing at all to prove. Although the burden of proof of the main facts in issue, or of substantially the whole of such facts except the amount of damages may be on the defendant, yet in practice the plaintiff generally begins.

The reason for this rule was thus given by Lord Denman, in *Mercer* v. *Whall* (*c*):—

"The plaintiff should bring his own cause of complaint before the Court and jury, in every case where he has anything to prove either as to the facts necessary for his obtaining a verdict, or as to

(*a*) See Odgers on Pleading and Practice, 8th ed., p. 322.
(*b*) Order XXXVI., r. 32; *Armour* v. *Bate*, [1891] 2 Q. B. 233.
(*c*) 5 Q. B., at p. 458; Cockle, 133.

the amount of damage. It appears expedient that the judge, the jury, and the defendant himself, should know precisely how the claim is shaped. This disclosure may convince the defendant that the defence which he has pleaded cannot be established. On hearing the extent of the demand, the defendant may be induced at once to submit to it rather than persevere. Thus the affair reaches its natural and best conclusion. If this does not occur, the plaintiff, by bringing forward his case, points the defendant's attention to the proper object of the trial, and enables him to meet it with the full understanding of its nature and character."

Thus the plaintiff begins in actions of libel, slander and injuries to the person, and in all other actions in which the plaintiff seeks to recover unliquidated damages. So, wherever there are several issues and the burden of proving any one of them lies on the plaintiff, he is entitled to begin, provided he undertakes to give evidence on such issue. In an action brought to prove a will in solemn form the executors begin, whether they are defendants or plaintiffs.

Whichever side begins, the opening speech of counsel should state clearly, concisely and in chronological order the facts upon which he relies in support of his case. He must not open any fact which he is not prepared with evidence to prove. He may also, if he thinks it expedient, deal with any defence which has been raised by his opponent on the pleadings. But it is unwise at this stage of the proceedings to indulge in rhetoric or invective against the other party. The witnesses are then called, and each in turn will be examined in chief, cross-examined, and sometimes also re-examined.

Any witness who has been *subpœnaed* to attend the trial may refuse to give any evidence, unless he is first paid his proper expenses for attending. This is so even though the witness has been sworn (*d*). And, although

(*d*) *In re Working Men's Mutual Society*, 21 Ch. D. 831; and see *ante*, p. 581.

he has sworn to speak the truth, the whole truth, and nothing but the truth, he may nevertheless refuse to answer any questions which are unnecessarily offensive or against public policy (*e*). So, too, "the judge may in all cases disallow any questions put in cross-examination of any party or other witness which may appear to him to be vexatious, and not relevant to any matter proper to be inquired into in the cause or matter" (*f*).

When all the plaintiff's witnesses have been examined, and all documents material to his case have been put in and read, his case is closed. If the counsel for the defendant does not intend to call any witnesses, the plaintiff's counsel must at once address the jury, summing up his own evidence, and commenting on the defence, so far as it has been disclosed by the cross-examination; the defendant's counsel then addresses the jury, criticising the evidence for the plaintiff. If, however, the defendant's counsel intends to call witnesses, or if he has already put in any document, he addresses the jury at the conclusion of the plaintiff's case, opening the defence. He then calls his witnesses, each of whom may be examined, cross-examined, and re-examined, and he usually makes a second speech for the defendant, at the conclusion of which the counsel for the plaintiff replies on the whole case. Calling witnesses for the defendant necessarily entails this disadvantage, that it gives the plaintiff the last word with the jury. If there are two defendants, of whom one calls evidence material to the defence of both, and the other calls no evidence

(*e*) See *ante*, p. 209.
(*f*) Order XXXVI., r. 38; see *Wright* v. *Hearson*, [1916] W. N. 216.

at all, the latter has apparently a right of reply after the plaintiff's counsel has addressed the jury (*g*).

It is sometimes the duty of the judge to withdraw the case from the jury and to direct judgment to be entered for the defendant. He cannot do so after hearing merely the opening statement of the plaintiff's counsel, unless that counsel consents (*h*). The jury has no right to interpose and stop the case by finding in favour of one party, until they have heard all the evidence tendered by the other party and the speech of his counsel. If there is no evidence to go to the jury on any issue, the judge should withdraw that issue from the jury, but this should not be done if evidence has been given on either side on which the jury might reasonably act.

When all the evidence which either party wishes to place before the Court has been given, and the counsel for both sides have addressed the jury, the judge sums up the case. He will explain to the jury what are the issues which they have to decide. He will direct them as to the law applicable to the facts proved before them; and the jury must follow the judge's ruling on any matter of law. But it is for the jury to find the facts. The judge may state his own opinion on any question of fact, but the jury is not bound to accept it. They must give their verdict according to their

(*g*) *Ryland* v. *Jackson and Brodie*, 18 T. L. R. 574. Where there are two defendants, who are separately represented and each calls witnesses, the counsel for the defendant who first opens his case will be the first to sum up to the jury: *Medley* v. *London United Tramways*, 26 T. L. R. 315.

(*h*) *Fletcher* v. *London and North-Western Rail. Co.*, [1892] 1 Q. B. 122; cf. *Fox* v. *Star Newspaper Co.*, [1900] A. C. 19; but see *Speake* v. *Hughes*, [1904] 1 K. B. 138.

own view of the evidence. Upon the verdict follows judgment.

It is the duty of the judge to decide all questions as to the admissibility of evidence (*i*)—as, for instance, whether a witness is mentally capable of giving evidence, or whether secondary evidence of a document may be given (*k*). Thus, if the plaintiff tenders a copy of a material document as secondary evidence on the defendant's refusing to produce the original, it is for the judge to decide whether he will admit that copy or not, even though the question whether an original ever existed is the main issue in the action, and must therefore be ultimately left to the jury (*l*). If, after admitting a witness to give evidence, the judge is convinced by proof of subsequent facts, and by observation of the witness's demeanour, that the latter is not competent, he may withdraw such evidence from the jury (*m*). But in a jury case the judge cannot decide as to the credibility of a competent witness; this is solely for the jury (*n*).

It is also the duty of the judge to point out to the jury the considerations by which the value of evidence has to be tested; but he need not, unless he pleases, in his summing up express his own opinion as to the weight to be attached to any particular piece of evidence. Again, before he leaves the decision of any issue of fact to the jury, the judge must first decide whether there is any sufficient evidence to be left to them. He should not do so, unless there is some evidence fit for their consideration on the issues which they have to try. Where there is merely a *scintilla* of evidence, he ought not to leave it to a jury (*o*); and the test whether the evidence only amounts to a *scintilla* is this: Would it, if

(*i*) *Bartlett* v. *Smith*, 11 M. & W. 483; Cockle, 10.
(*k*) *Boyle* v. *Wiseman*, 10 Ex. 647.
(*l*) *Stowe* v. *Querner*, L. R. 5 Ex. 155.
(*m*) *R.* v. *Whitehead*, L. R. 1 C. C. R. 33; see also *R.* v. *Hill*, 2 Den. 254.
(*n*) *Heslop* v. *Chapman*, 12 Q. B. 928.
(*o*) *Giblin* v. *McMullen*, L. R. 2 P. C., at p. 335; *Ryder* v. *Wombwell*, L. R. 4 Ex. 32.

wholly uncontradicted, justify a jury in finding a verdict in accordance with it? (*p*) If it would, the judge should not withdraw the case from them (*q*). He cannot do so, where a witness has positively sworn to something having taken place within his own knowledge, by which, if it did take place, the case is proved (*r*).

In a case of wrongful dismissal, Lord JAMES OF HEREFORD laid down the rules which should guide a judge where evidence fit to be laid before the jury has been given on any issue of fact:—

"The questions raised in the present case had to be tried by the jury. But in cases where the trial must so take place the presiding judge has important duties to fulfil. It is for him to say whether there is any evidence to submit to the jury in support of the allegation of justifiable dismissal. If no such evidence has in his opinion been given, he should not submit any issue in respect of such allegations. The judge may also direct, guide, and assist the jury. He may direct by informing them of the nature of the acts which as a matter of law will justify dismissal. He may guide them by calling their attention to the facts material to the determination of the issues raised, and he may assist them in a manner and to an extent there is no reason to define. There have been judges—more numerous in the past than in the present—who possessed and exercised the power of addressing a jury in terms of apparent impartiality, and yet of placing before them views which seldom failed to secure the verdict desired by the judge to be recorded" (*s*).

Questions of law, then, other than foreign law, are for the judge; questions of fact are for the jury. But it is not always easy to distinguish a question of fact from one of law. In any action founded upon a contract the question whether an act has been done within a reasonable time or in a reasonable manner is for the jury. Thus, under the Sale of Goods Act, 1893 (*t*), it is for the jury to say whether, in the circumstances of the case, goods have been made or delivered within a reasonable time. But where the length of time necessary is governed by fixed legal principles, the question is for the judge, as in cases of notices to quit or to terminate employment.

(*p*) *Per* MELLISH, L.J., in *Ex parte Morgan*, 2 Ch. D., at p. 90.
(*q*) *Dare* v. *Heathcote*, 25 L. J. Ex. 245; *Jewsbury* v. *Newbold*, 26 L. J. Ex. 247.
(*r*) See *Ex parte Morgan*, 2 Ch. D., at p. 90.
(*s*) *Clouston & Co., Ltd.* v. *Corry*, [1906] A. C., at pp. 129, 130.
(*t*) 56 & 57 Vict. c. 71, s. 56.

So, too, the question whether a covenant in restraint of trade is reasonable or not is one for the judge, but if any of the facts which the judge must take into account in deciding the question are disputed, the jury should be asked to find them (*u*). When an infant is sued for the price of goods supplied to him, the judge will decide first whether the plaintiff must prove that the goods were necessaries to the infant and whether he has given any evidence to go to the jury in proof thereof, but it is for the jury to find whether the goods were, in fact, necessaries or not (*x*).

In cases of tort the same rule applies. Thus questions of reasonable skill (*y*), diligence, and negligence are all for the jury, if there is any evidence to go to them. As was laid down by the House of Lords in *Metropolitan Railway Co.* v. *Jackson* (*z*), in actions claiming damages for negligence, it is for the judge to say on the facts in evidence whether negligence can be inferred, and, if not, to withdraw the case from the jury. But if there is any such evidence, the question whether negligence ought to be so inferred is one for the jury. The burden of proving negligence is on the plaintiff (*a*), and he does not discharge that burden by proving facts equally consistent with diligence or negligence (*b*). Even where the question depends on matters of technical legal detail the rule applies, and the jury must decide the issue (*c*).

The issues of malice, good faith, actual knowledge, and real intention are for the jury. Thus, in actions for defamation, it is for the judge to decide whether the occasion was privileged or not (*d*); if he finds that the

(*u*) *Dowden and Pook, Ltd.* v. *Pook*, [1904] 1 K. B. 45 *Haynes* v. *Doman*, [1899] 2 Ch. 13.

(*x*) *Ryder* v. *Wombwell*, L. R. 4 Ex. 32.

(*y*) *McCall* v. *Australian Meat Co.*, 19 W. R. 188.

(*z*) 3 App. Cas. 193.

(*a*) For the doctrine of *Res ipsa loquitur*, see *ante*, p. 147.

(*b*) *Wakelin* v. *London and South-Western Rail. Co.*, 12 App. Cas. 41; *Pomfret* v. *Lancashire and Yorkshire Rail. Co.*, [1903] 2 K. B. 718; and see *Manzoni* v. *Douglas*, 6 Q. B. D. 145.

(*c*) *Doorman* v. *Jenkins*, 2 A. & E., at pp. 260, 261.

(*d*) *Stace* v. *Griffith*, L. R. 2 P. C. 420; see *Hebditch* v. *McIlwaine*, [1894] 2 Q. B. p. 58; *Hope* v. *I'Anson*, 18 T. L. R. 201.

occasion was privileged, it will be for the jury to find whether the defendant was actuated by malice, if there be any evidence of malice to be left to them (*e*). When "fair comment" is pleaded as a defence, the judge decides whether it is comment at all (*f*), and whether the matter is one of public interest (*g*); but then it is for the jury to decide whether the comment is fair (*h*) and whether the defendant was actuated by malice (*i*). So, too, the jury find whether a report of a judicial proceeding was fair or not (*k*).

The question, libel or no libel, is pre-eminently one for the jury (*l*). The judge, however, must withdraw the case from them if he comes to the conclusion that the words are not reasonably capable of a defamatory meaning (*m*). He should not do so unless he is satisfied that the publication cannot be a libel, and that a verdict finding that it was a libel would be set aside (*n*). The jury decides the meaning of words of a cant or slang character, whether written or spoken, which are alleged to be defamatory (*o*). Again, it is for the jury to find whether the words complained of are true in substance and in fact (*p*).

The question what is a reasonable and probable cause is, as a rule, for the jury. Actions for malicious prosecution and false imprisonment are exceptional. Thus in

(*e*) *Harrison* v. *Bush*, 5 E. & B. 344; and see *Clark* v. *Molyneux*, 3 Q. B. D. 237; *Jenoure* v. *Delmege*, [1891] A. C. 73.

(*f*) *Henwood* v. *Harrison*, L. R. 7 C. P. p. 628; *McQuire* v. *Western Morning News Co.*, [1903] 2 K. B. pp. 112, 113.

(*g*) *Dakhyl* v. *Labouchere* (H. L.), [1908] 2 K. B. 325 n.

(*h*) *Merivale* v. *Carson*, 20 Q. B. D., at p. 280; *Cooney* v. *Edevain*, 14 T. L. R. 34.

(*i*) *Thomas* v. *Bradbury, Agnew & Co.*, [1906] 2 K. B. p. 637.

(*k*) *Street* v. *Licensed Victuallers' Society*, 22 W. R. 553.

(*l*) *Per* Lord COLERIDGE, C.J., in *Saxby* v. *Easterbrook*, 3 C. P. D., at p. 342.

(*m*) *Speake* v. *Hughes*, [1904] 1 K. B. 138; *Dauncey* v. *Holloway*, [1901] 2 K. B. 441.

(*n*) *Cox* v. *Lee*, L. R. 4 Ex. 288; but see *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741.

(*o*) *Barnett* v. *Allen*, 3 H. & N. 376; *Stannus* v. *Finlay*, 8 Ir. R. C. L. 264.

(*p*) *Alexander* v. *N.-E. Ry. Co.*, 6 B. & S. 340.

the former the plaintiff must show (among other things) that the defendant had no reasonable and probable cause for prosecuting him, and this is a question for the judge (*q*); and in so doing was actuated by malice, which is a fact to be found by the jury (*r*). So, too, in actions of false imprisonment, in certain cases the defendant will succeed if he can show that he had reasonable and probable cause for arresting the plaintiff, and this the judge will decide (*s*).

It is enough if only the substance of the issue is proved. A party will not be prejudiced by failing to prove any matter which he has alleged in his pleading, if it be unnecessary to support his claim. Thus, it is immaterial that the plaintiff has succeeded in recovering an amount less than that claimed on his pleadings—except, possibly, with regard to costs. A plea of tender is proved by evidence of tender of a larger sum than is alleged (*t*). So, a plea of payment in accord and satisfaction is proved by proof of payment of a sum sufficient to cover the plaintiff's real demand (*u*). In an action of slander it is enough to prove the material words on the record: and where there are several actionable words, it is enough to prove any of them (*x*); or any words which bear practically the same meaning as any of them (*y*).

Moreover, the judge now has a very large power of amending the pleadings at a trial, whenever he is of opinion that the justice of the case requires it. This power is, in the High Court, regulated by Order XXVIII., rr. 1-6. The Court of Appeal has, by virtue of Order LVIII., r. 4, the same powers of amendment as

(*q*) *Lister* v. *Perryman*, L. R. 4 H. L. 521; cf. *West* v. *Baxendale*, 9 C. B. 141.

(*r*) *Haddrick* v. *Heslop*, 12 Q. B. 275; *Brown* v. *Hawkes*, [1891] 2 Q. B. 718.

(*s*) *Howard* v. *Clarke*, 20 Q. B. D. 558.

(*t*) *Dean* v. *James*, 4 B. & Ad. 546; but see *Rivers* v. *Griffiths*, 5 B. & Ald. 630.

(*u*) *Falcon* v. *Benn*, 2 Q. B. 314.

(*x*) *Compagnol* v. *Martin*, 2 W. Bl. 790.

(*y*) *Ecklin* v. *Little*, 6 T. L. R. 366.

the High Court. Under these provisions, the Court will allow any pleading to be amended at any stage of the action, including the trial or hearing, unless the amendment changes the whole nature of the action (*z*), or unless the party applying has been acting *malâ fide*, or by his blunder has done some injury to the other side which cannot be compensated by costs or otherwise (*a*). The Court will allow any amendment which would tend to the determination of the real question in controversy, but not for the purpose of enabling a purely technical objection to be raised (*b*).

Evidence by Affidavit.

By Rule 1 of Order XXXVII. (*c*), discretionary powers are vested in the Court: (i.) to order any particular fact or facts to be proved by affidavit; (ii.) to allow the affidavit of any witness to be read at a hearing or trial on such conditions as it may think reasonable, with this proviso, that when the opposite party *bonâ fide* desires to cross-examine a witness, and the witness can be produced, such witness's evidence shall not be allowed to be given by affidavit. The first of these powers, which can be exercised by the Court, even against the wishes of both parties, can be advantageously employed to the manifest saving of expense in proof of formal matters, even in trials by jury. The second, which, subject to the proviso, can be exercised by the Court at the instance of one party, but against the wish of the other, enables, in proper cases, the evidence of an absent witness to be brought before the Court without the expensive interposition of a commissioner or examiner.

Upon any motion, petition or summons, however (*d*),

(*z*) *Newby* v. *Sharpe*, 8 Ch. D. 39.

(*a*) *Per* BRAMWELL, L.J., in *Tildesley* v. *Harper*, 10 Ch. D. 396; cf. *Steward* v. *North Metropolitan Tramways Co.*, 16 Q. B. D. 556.

(*b*) *Australian Steam Navigation Co.* v. *Smith*, 14 App. Cas. 318; *Dillon* v. *Balfour*, 20 L. R. Ir. 600; *Hyams* v. *Stuart King*, [1908] 2 K. B. 696, 724.

(*c*) For which see the Appendix.

(*d*) Order XXXVIII., r. 1; and see *Abrahams* v. *Dunlop*, [1905] 1 K. B. 46.

and in default actions *in rem*, and in references in Admiralty actions (*e*), evidence may be given by affidavit. Further exceptions have been created by statute (*f*). In all other cases, every witness, at the trial of any action or at any assessment of damages, must be examined *vivâ voce* and in open Court, unless the solicitors of all parties to an action consent to the evidence being taken by affidavit; or unless an order has been made under the above rule. The parties frequently consent to evidence being taken on affidavit in actions for partition, and in actions where the object of the parties is to obtain a judicial decision upon facts as to which there is little, if any, dispute. But where the parties are at arm's length, and there is a serious dispute as to the facts, it is obviously better that the witnesses should be examined *vivâ voce* and in open Court. The two chief defects in affidavit evidence are these—that the Court has no opportunity of observing the demeanour of the witness while under examination; and that the version given of the story is too often that of the lawyer who prepares the affidavit rather than that of the deponent. The agreement to take the evidence by affidavit must be a formal one, and cannot be gathered from correspondence (*g*). If one of the parties to the agreement finds himself afterwards unable to procure affidavits by reason of the reluctance of his witnesses to make them, or from any other good cause, he should take out a summons to be relieved from the agreement, and the Court can make an order that the reluctant witness be examined at the trial, or, at the option of the other party, discharge the agreement, and direct all the evidence to be taken *vivâ voce* (*h*). Where the opposite party desires to cross-examine a witness who can be produced, his affidavit cannot be read at the

(*e*) Order XXXVII., r. 2.

(*f*) *E.g.*, the Bankers' Books Evidence Act, 1879, for which see *ante*, p. 320.

(*g*) *New Westminster Brewery Co.* v. *Hannah*, 1 Ch. D. 278.

(*h*) *Warner* v. *Mosses*, 16 Ch. D. 100; *Glossop* v. *Heston Local Board*, 47 L. J. Ch. 536; *Lovell* v. *Wallis*, 53 L. J. Ch. 494.

trial if the cross-examining party objects (*i*). An affidavit once filed cannot be withdrawn for the purpose of preventing the deponent being cross-examined thereon (*k*).

Affidavits must be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted (*l*). The words "with the grounds thereof" have been very frequently disregarded in practice, but unless they are acted upon, statements on information and belief ought to be disregarded *in toto* (*m*). In a case in the Court of Appeal (*n*), RIGBY, L.J., said :—

"In the present day, in utter defiance of the order, solicitors have got into a practice of filing affidavits in which the deponent speaks not only of what he knows, but also of what he believes, without giving the slightest intimation with regard to what his belief is founded on. Or he says, 'I am informed' without giving the slightest intimation where he has got his information. Now every affidavit of that kind is utterly irregular, and, in my opinion, the only way to bring about a change in that irregular practice is for the judge, in every case of the kind, to give a direction that the costs of the affidavit, so far as it relates to matters of mere information or belief, shall be paid by the person responsible for the affidavit."

Evidence by affidavit in the County Courts is regulated by Orders XVIII. and XIX. of the County Court Rules, 1903–1920.

Evidence in the Court of Appeal.

After judgment has been given, there are two courses open to the unsuccessful party if he wishes to take the matter further. He may either apply to the Court of Appeal to enter judgment for him on the ground that, on the facts proved at the trial,

(*i*) *Blackburn Guardians* v. *Brooks*, 7 Ch. D. 68; see proviso to Order XXXVII., r. 1.

(*k*) *In re Quartz Hill, etc., Co., Ex parte Young*, 21 Ch. D. 642.

(*l*) Order XXXVIII., r. 3.

(*m*) Cf. judgment of JESSEL, M.R., in *Quartz Hill, etc., Co.* v. *Beall*, 20 Ch. D., at p. 508.

(*n*) *Young* v. *Young Manufacturing Co., Ltd.*, [1900] 2 Ch. 753.

the judgment entered is bad in law, or he may move that Court for a new trial. He may, if he thinks fit, do both at the same time.

It is unnecessary, in this book, to say anything as to an appeal in point of law.

He may move for a new trial on several different grounds, with only four of which we are here concerned. These are :—

(i.) That the verdict is against the weight of evidence.

(ii.) That fresh evidence has been newly discovered.

(iii.) That he was taken by surprise at the trial.

(iv.) That the judge wrongly received or wrongly rejected evidence.

In the first place, however, it is necessary to consider how the evidence in the Court below must be brought before the Court of Appeal. This is regulated by Order LVIII., rr. 11–13, which will be found set out in the Appendix.

The evidence given orally must be brought before the Court of Appeal by production of the judge's notes—if any were taken—on the point (*o*). His mere private memoranda, however, are not admissible (*p*). The judge's notes are not public property, and a copy of them will not be supplied to the litigants, nor even to the Lords on the hearing of an appeal in the House of Lords unless specially asked for (*q*).

The Court may also permit such evidence to be brought before it in other ways. Thus, where the parties have

(*o*) *Ellington* v. *Clark*, 38 Ch. D. 332. It is the duty of the appellant's solicitor to cause copies to be supplied to the Court of Appeal: *Lewis* v. *Cory*, [1906] W. N. 95.

(*p*) *Baudains* v. *Liquidators of Jersey Banking Co.*, 13 App. Cas. 832.

(*q*) *Schweppes, Ltd.* v. *Gibbens*, [1905] W. N. 28.

agreed in the Court below with the consent of the judge that shorthand notes should be taken, transcripts of those notes may be used on the appeal. But if the judge has himself taken notes, the Court of Appeal can always refer to them, in spite of any agreement between the parties, for the parties have no right to deprive the Court of the advantage of such notes (*r*).

When shorthand notes have been taken without any agreement, a transcript of them may by special leave be used to supplement the judge's notes. The Court of Appeal frequently, if the case has been reported in a recognised series of law reports, also looks at such report.

(i.) It is, as we have seen (*s*), a question of law for the judge whether on any issue there is evidence fit to be laid before the jury, and if he decides this question wrongly, there is ground for an appeal. But the objection that the verdict of the jury is against the weight of the evidence raises a question of fact, and is therefore ground for a motion for a new trial. The judge and jury below who saw the witnesses and heard them cross-examined are the best judges of the weight of their evidence. It does not matter how many witnesses swore one way, and how few the other. Where there is any evidence on both sides proper to be submitted to a jury, their verdict once found must stand (*t*). In the absence of any misdirection, the Court will not interfere to set aside a verdict or grant a new trial on the ground that the verdict was against the weight of evidence, unless the verdict was one

(*r*) *Yorkshire Laundries, Ltd.* v. *Pickles*, [1901] W. N. 28.
(*s*) See *ante*, p. 601.
(*t*) *Commissioner for Railways* v. *Brown*, 13 App. Cas. 133.

which no reasonable men could have found (*u*). "The verdict ought not to be disturbed unless it was one which a jury, viewing the whole of the evidence reasonably, could not properly find" (*x*).

The hearing of an appeal from a judge sitting without a jury is a rehearing, and it is the duty of the Court of Appeal to reconsider the evidence, and, if the circumstances warrant, to differ from the judge even on a question of fact turning on the credibility of the witnesses (*y*).

When, however, the decision does not depend on the credibility of the witnesses, but is based on inferences drawn from the evidence, it may be reversed by the Court of Appeal (*z*). It is sometimes urged that a Court of Appeal cannot, or perhaps rather ought not to, interfere with the finding of a judge of first instance on a question of fact. The judge of first instance has heard the witnesses, and had an opportunity, "which the appellate tribunal does not possess," of testing their credit by their demeanour under examination. Hence great weight should be always attached to the finding of fact at which he has arrived. As COZENS-HARDY, M.R., said in *In re Wagstaff* (*a*):—

"The Court below has had the inestimable advantage of judging from the demeanour of the witnesses whether they are or are not speaking the truth; and I think, further, that the Court of Appeal ought not in a case of this kind to depart from or vary the findings of fact of the learned judge in the Court below, unless the Court of Appeal is clearly satisfied that there has been something important overlooked or, in short, that the learned judge has made such a mistake as would almost have justified another division of the Court in directing a new trial on the ground that the verdict was against the weight of evidence."

(*u*) *Webster* v. *Friedeberg*, 17 Q. B. D. 736; *Phillips* v. *Martin*, 15 App. Cas. 193; *Australian Newspaper Co., Ltd.* v. *Bennett*, [1894] A. C. 284; *Cox* v. *English, etc., Bank*, [1905] A. C. 168.

(*x*) *Per* Lord HERSCHELL, L.C., in *Metropolitan Ry. Co.* v. *Wright*, 11 App. Cas., at p. 154; and see *per* Lord HALSBURY, *ibid.*, at p. 156.

(*y*) *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704; *Att.-Gen.* v. *Birmingham Drainage Board*, [1912] A. C. 788.

(*z*) *The Glannibanta*, 1 P. D. 283.

(*a*) 98 L. T., at p. 151.

But the hearing upon an appeal is a rehearing, and there is no presumption that the judgment in the Court below is right. Upon appeal from a judge, where both fact and law are open to appeal, the appellate tribunal is bound to pronounce such judgment as in their view ought to have been pronounced by the Court below (*b*).

The case is very different when a jury has found a fact. In that case an appeal is not a rehearing of the facts, because the law has entrusted to the jury the duty of finding the facts. Hence the appellate Court can only disturb the verdict where, in their judgment, honest men could not reasonably have found that verdict. As the EARL OF SELBORNE, L.C., said in *Metropolitan Ry. Co.* v. *Wright* (*c*):—

> "It is not enough that the judge who tried the case might have come to a different conclusion on the evidence than the jury, or that the judges in the Court where the new trial is moved for might have come to a different conclusion, but there must be such a preponderance of evidence, assuming there is evidence on both sides to go to the jury, as to make it unreasonable, and almost perverse, that the jury when instructed and assisted properly by the judge should return such a verdict."

Where the real question to be determined was properly left to the jury, and they have answered it reasonably, their verdict cannot be disturbed (*d*). A judgment will not be set aside merely on the ground that it was obtained by perjury (*e*); but the Court has, of course, jurisdiction to set aside any judgment obtained by fraud (*f*). A juryman, after he has left the jury box, cannot be heard to complain of a verdict to which he was a party (*g*).

(ii.) The defeated litigant may also move for a new trial on the ground that he is now in possession

(*b*) See *per* Lord HALSBURY, L.C., in *Rickmann* v. *Thierry*, 14 R. P. C., at p. 116.

(*c*) 11 App. Cas., at p. 153; this passage was cited with approval by Lord DAVEY in *Cox* v. *English, etc., Bank*, [1905] A. C., at p. 170.

(*d*) *Jones* v. *Spencer*, 77 L. T. 536.

(*e*) *Baker* v. *Wadsworth*, 67 L. J. Q. B. 301.

(*f*) *Cole* v. *Langford*, 67 L. J. Q. B. 698.

(*g*) *Nesbitt* v. *Parrett*, 18 T. L. R. 510.

of fresh material evidence of which he was not aware at the date of the trial. The Court of Appeal has power to receive further evidence upon questions of fact, either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. In all other cases such further evidence will not be admitted except on special grounds, and by special leave of the Court (*h*).

The Court of Appeal will not grant such leave —except by the consent of both parties (*i*)— unless it is satisfied that the fresh evidence tendered could not with reasonable diligence have been discovered before the trial, and further, when it is so conclusive as to make it practically certain that the verdict would have been different if it had been adduced (*k*).

JESSEL, M.R., in delivering judgment in the Court of Appeal in *Sanders* v. *Sanders* (*l*), said :—

"The appellant has applied for leave to adduce fresh evidence, but I am of opinion that it ought not to be granted. The application is for an indulgence. He might have adduced the evidence in the Court below. That he might have shaped his case better in the Court below is no ground for leave to adduce fresh evidence before the Court of Appeal. As it has often been said, nothing is more dangerous than to allow fresh oral evidence to be introduced after a case has been discussed in Court. The exact point on

(*h*) Order LVIII., r. 4.
(*i*) *Saccharin Corporation* v. *Wild*, [1903] 1 Ch. 410.
(*k*) *Phosphate Sewage Co.* v. *Molleson*, 4 App. Cas. 801; *Evans* v. *Benyon*, 37 Ch. D. 345; *Evans* v. *Merthyr Tydfil U. D. C.*, [1899] 1 Ch. 241; *Turnbull & Co.* v. *Duval*, [1902] A. C. 429; cf. *Robinson* v. *Smith*, [1915] 1 K. B. 711.
(*l*) 19 Ch. D., at pp. 380, 381.

which evidence is wanted having thus been discovered, to allow fresh evidence to be introduced at that stage would offer a strong temptation to perjury."

(iii.) Again, the unsuccessful party may, in exceptional circumstances, apply for a new trial on the ground of "surprise." This term is used to describe those cases in which either party has been prevented from having a fair trial through no fault of his own, *e.g.*, if the case be unexpectedly called on when he was reasonably absent; if his opponent misled him as to the time or place of the trial; if the case took a wholly unexpected turn which could not reasonably have been anticipated; or if a material witness was kept away by his opponent. Whenever a new trial is moved for on the ground of surprise, there must be an affidavit setting out the facts. "Surprise is a matter extrinsic to the record and the judge's notes, and consequently can only be made to appear by affidavit" (*m*).

(iv.) It is possible that the judge in the Court below may have received some evidence which ought not to have been admitted, or refused to admit some evidence which he should have received. In either event, the party whose case was prejudiced thereby has good ground for applying for a new trial, if "in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial" (*n*). But this rule does not apply if the party now objecting to the evidence as having been wrongly received made no objection to it when it was tendered by his

(*m*) *Per* MAULE, J., in *Hoare* v. *Silverlock* (No. 2), 9 C. B. 22.
(*n*) Order XXXIX., r. 6; and see *Burvill* v. *Vickers, Ltd.*, [1916] 1 K. B. 180, 185; *Barber & Co.* v. *Deutsche Bank*, [1919] A. C. 304.

opponent in the Court below. He is not entitled to raise any objection to the evidence for the first time after it has once been received. Nevertheless the Court of Appeal may, if it thinks fit, of its own motion reject any evidence which was improperly received in the Court below, although no objection was taken to it there, and decide the case only on evidence legally admissible (*o*).

The fact that evidence was improperly admitted or rejected at the trial is a good *primâ facie* ground for granting a new trial. The *onus* of proving that no substantial wrong or miscarriage was thereby occasioned lies on the respondent (*p*). The Court will not grant a new trial if it is satisfied that the jury, if rightly directed, would still have returned the same verdict (*q*).

The Court of Appeal will not entertain technical objections to the admissibility of documentary evidence not taken in the Court below, and which if taken might have been met by calling further evidence (*r*).

Evidence in the House of Lords.

From the Court of Appeal there is a further appeal to the House of Lords. This tribunal can grant a new trial on the same grounds as the Court of Appeal. For the practice on such a motion, the reader is referred to Denison & Scott's "House of Lords Practice." The House of Lords when sitting as the Court of final appeal, has power to hear witnesses, but this power is seldom exercised.

(*o*) *Jacker* v. *International Cable Co.*, 5 T. L. R. 13.
(*p*) *Anthony* v. *Halstead*, 37 L. T. 433; *Bray* v. *Ford*, [1896] A. C. 44; *Tait* v. *Beggs*, [1905] 2 Ir. R. 525.
(*q*) *Per* Lord Esher, M.R., in *Merivale* v. *Carson*, 20 Q. B. D., at p. 281; *Floyd* v. *Gibson*, 100 L. T. 761.
(*r*) *Bradshaw* v. *Widdrington*, [1902] 2 Ch. 430.

APPENDIX

I. STATUTES.

	PAGE
Evidence Act, 1851 (14 & 15 Vict. c. 99), ss. 2, 3, 6–8, 11, 13, 14	617
Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83), ss. 1–3, 5	619
Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), ss. 2, 3, 6, Schedule	620
Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), ss. 2, 3	621
Documentary Evidence Act, 1882 (45 & 46 Vict. c. 9), ss. 2–4	622
Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 100	622
Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), ss. 1–4, 6	623
Prevention of Cruelty to Children Act, 1904 (4 Edw. VII. c. 15), ss. 12, 15, 17, 18 (3), 23 (3), 24	624
Oaths Act, 1909 (9 Edw. VII. c. 39), ss. 2, 3	626
Criminal Justice Administration Act, 1914 (4 & 5 Geo. V. c. 58), ss. 28, 29	626
Larceny Act, 1916 (6 & 7 Geo. V. c. 50), s. 43	627

II. RULES OF COURT.

(i.)	Rules of the Supreme Court, 1883:	
	Order XXX., rr. 1 (a) (b), 7 (Summons for Directions)	629
	Order XXXI., rr. 1, 2, 5, 6, 8, 11–15, 17, 18, 19A, 20 (Discovery and Inspection)	629
	Order XXXVII., rr. 1–5, 6A–25, 35–38 (Evidence, etc.)	632
	Order XXXVIII., rr. 1–30 (Affidavits and Depositions)	636
	Order LVIII., rr. 11–13 (Appeals to the Court of Appeal)	639
(ii.)	The Bankruptcy Rules, 1915, rr. 17, 61, 66, 69, 70, 72, 73	640
(iii.)	The County Court Rules, 1903 to 1920:	
	Order XVI., rr. 1–22 (Discovery and Inspection)	641
	Order XVIII., rr. 1, 2, 5–22, 24–33 (Evidence, etc.)	645
	Order XIX., rr. 1, 2, 4, 5, 7, 9, 10 (Affidavits)	649

I. STATUTES.

EVIDENCE ACT, 1851.

(Lord Brougham's Act.)

(14 & 15 Vict. c. 99.)

2. On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *vivâ voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding.

3. But nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband.

6. Whenever any action or other legal proceeding shall henceforth be pending in any of the superior courts of common law at Westminster or Dublin . . . such court . . . may, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same, or to procure the same to be duly stamped, in all cases in which previous to the passing of this Act a discovery might have been obtained by filing a bill or by any other proceeding in a court of equity at the instance of the party so making application as aforesaid to the said court.

7. All proclamations, treaties, and other acts of state of any foreign state or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or in any British colony, and all affidavits, pleadings,

and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or, in the event of such court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges of the said court; and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.

8. Every certificate of the qualification of an apothecary which shall purport to be under the common seal of the society of the art and mystery of apothecaries of the city of London shall be received in evidence in any court of justice, and before any person having by law or by consent of parties authority to hear, receive, and examine evidence, without any proof of the said seal or of the authenticity of the said certificate, and shall be deemed sufficient proof that the person named therein has been from the date of the said certificate duly qualified to practise as an apothecary in any part of England or Wales.

11. Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any court of justice in England or Wales or Ireland without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice of any of the British colonies, or before any person having in any of such colonies by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

13. . . . whenever in any proceeding whatever it may be necessary to prove the trial and conviction or acquittal of any

person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof; but it shall be sufficient that it be certified or purport to be certified under the hand of the clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof.

14. Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words.

EVIDENCE AMENDMENT ACT, 1853.

(16 & 17 Vict. c. 83.)

1. On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit, action, or other proceeding may be brought or instituted, or opposed or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding.

2. Nothing herein shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any criminal proceeding [*or in any proceeding instituted in consequence of adultery*].

3. No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife

N.B.—The portion of s. 2 printed in *italics* was repealed by 32 & 33 Vict. c. 68, s. 1.

shall be compellable to disclose any communication made to her by her husband during the marriage.

5. In citing this Act in other Acts of Parliament, or in any instrument, document, or proceeding, it shall be sufficient to use the expression the Evidence Amendment Act, 1853.

DOCUMENTARY EVIDENCE ACT, 1868.

(31 & 32 VICT. c. 37.)

2. *Primâ facie* evidence of any proclamation, order or regulation issued before or after the passing of this Act by Her Majesty, or by the Privy Council, also of any proclamation, order, or regulation issued before or after the passing of this Act by or under the authority of any such department of the Government or officer as is mentioned in the first column of the schedule hereto, may be given in all courts of justice, and in all legal proceedings whatsoever, in all or any of the modes hereinafter mentioned; that is to say:

(1.) By the production of a copy of the Gazette purporting to contain such proclamation, order, or regulation.

(2.) By the production of a copy of such proclamation, order, or regulation, purporting to be printed by the Government printer, or, where the question arises in a court in any British colony or possession, of a copy purporting to be printed under the authority of the legislature of such British colony or possession.

(3.) By the production, in the case of any proclamation, order, or regulation issued by Her Majesty or by the Privy Council, of a copy or extract purporting to be certified to be true by the clerk of the Privy Council, or by any one of the lords or others of the Privy Council; and, in the case of any proclamation, order, or regulation issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said schedule in connection with such department or officer.

Any copy or extract made in pursuance of this Act may be in print or in writing, or partly in print and partly in writing. No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy of or extract from any proclamation, order, or regulation.

3. Subject to any law that may be from time to time made by the legislature of any British colony or possession, this Act shall be in force in every such colony and possession.

6. The provisions of this Act shall be deemed to be in addition to, and not in derogation of, any powers of proving documents given by any existing statute, or existing at common law.

SCHEDULE (*a*).

COLUMN 1. *Name of Department or Officer.*	COLUMN 2. *Names of Certifying Officers.*
The Commissioners of the Treasury.	Any Commissioner, Secretary, or Assistant Secretary of the Treasury.
The Commissioners for executing the office of Lord High Admiral.	Any of the Commissioners for executing the office of Lord High Admiral, or either of the Secretaries to the said Commissioners.
Secretaries of State.	Any Secretary or Under Secretary of State.
Committee of Privy Council for Trade.	Any Member of the Committee of Privy Council for Trade, or any Secretary or Assistant Secretary of the said Committee.
The Poor Law Board.	Any Commissioner of the Poor Law Board, or any Secretary or Assistant Secretary of the said Board.

EVIDENCE FURTHER AMENDMENT ACT, 1869.

(32 & 33 VICT. c. 68.)

2. The parties to any action for breach of promise of marriage shall be competent to give evidence in such action: Provided always, that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise.

3. The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding: Provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery.

(*a*) The Board of Agriculture has been in effect added to the schedule by the Documentary Evidence Act, 1895 (58 Vict. c. 9).

DOCUMENTARY EVIDENCE ACT, 1882.

(45 & 46 VICT. c. 9.)

2. Where any enactment, whether passed before or after the passing of this Act, provides that a copy of any Act of Parliament, proclamation, order, regulation, rule, warrant, circular, list, gazette, or document shall be conclusive evidence, or be evidence, or have any other effect, when purporting to be printed by the government printer, or the Queen's printer, or a printer authorised by Her Majesty, or otherwise under Her Majesty's authority, whatever may be the precise expression used, such copy shall also be conclusive evidence, or evidence, or have the said effect (as the case may be) if it purports to be printed under the superintendence or authority of Her Majesty's stationery office.

3. If any person prints any copy of any Act, proclamation, order, regulation, royal warrant, circular, list, gazette, or document which falsely purports to have been printed under the superintendence or authority of Her Majesty's stationery office, or tenders in evidence any copy which falsely purports to have been printed as aforesaid, knowing that the same was not so printed, he shall be guilty of felony, and shall, on conviction, be liable to penal servitude for a term not exceeding seven years, or to be imprisoned for a term not exceeding two years, with or without hard labour.

4. The Documentary Evidence Act, 1868, as amended by this Act, shall apply to proclamations, orders, and regulations issued by the Lord Lieutenant . . . either alone or acting with the advice of the Privy Council in Ireland, as fully as it applies to proclamations, orders, and regulations issued by Her Majesty.

In the same Act, the term "the Privy Council" shall include the Privy Council in Ireland, or any committee thereof.

In the same Act, and in this Act, the term "the Government Printer" shall include any printer to Her Majesty in Ireland and any printer printing in Ireland under the superintendence or authority of Her Majesty's stationery office.

FRIENDLY SOCIETIES ACT, 1896.

(59 & 60 VICT. c. 25.)

100. Every document bearing the seal or stamp of the central office shall be received in evidence without further proof; and every document purporting to be signed by the chief or any assistant registrar, or any inspector or public auditor or valuer under this Act, shall, in the absence of any evidence to the contrary, be received in evidence without proof of the signature.

CRIMINAL EVIDENCE ACT, 1898.

(61 & 62 VICT. c. 36.)

1. Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows:

(a) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application:

(b) The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution:

(c) The wife or husband of the person charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged:

(d) Nothing in this Act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage:

(e) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged:

(f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked, shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

  (i.) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

  (ii.) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

  (iii.) he has given evidence against any other person charged with the same offence:

(g) Every person called as a witness in pursuance of this Act shall, unless otherwise ordered by the Court, give his evidence from the witness box or other place from which the other witnesses give their evidence:

(h) Nothing in this Act shall affect the provisions of section eighteen of the Indictable Offences Act, 1848, or any right of the person charged to make a statement without being sworn.

2. Where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution.

3. In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply.

4.—(1.) The wife or husband of a person charged with an offence under any enactment mentioned in the schedule to this Act may be called as a witness either for the prosecution or defence and without the consent of the person charged.

(2.) Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

6.—(1.) This Act shall apply to all criminal proceedings, notwithstanding any enactment in force at the commencement of this Act, except that nothing in this Act shall affect the Evidence Act, 1877 (*a*).

(2.) But this Act shall not apply to proceedings in courts martial unless so applied—

(a) as to courts martial under the Naval Discipline Act, by general orders made in pursuance of section sixty-five of that Act; and

(b) as to courts martial under the Army Act by rules made in pursuance of section seventy of that Act.

PREVENTION OF CRUELTY TO CHILDREN ACT, 1904.

(4 EDW. VII. c. 15.)

12. In any proceeding against any person for an offence under this Act, . . . such person shall be competent but not compellable to give evidence, and the wife or husband of such person may be required to attend to give evidence as an ordinary witness in the case, and shall be competent but not compellable to give evidence.

15.—(1.) Where, in any proceeding against any person for an offence under this Act (*b*), . . . the child in respect of whom the offence is charged to have been committed, or any other child of

(*a*) See *ante*, p. 177.

(*b*) But now see sub-s. (2) of s. 28 of the Criminal Justice Administration Act, 1914, *post*, p. 626.

tender years who is tendered as a witness, does not in the opinion of the court understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the court, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and the evidence of such child, though not given on oath, but otherwise taken and reduced into writing in accordance with the provisions of section seventeen of the Indictable Offences Act, 1848, or of section fourteen of the Petty Sessions (Ireland) Act, 1851, or of section thirteen of this Act, shall be deemed to be a deposition within the meaning of those sections respectively:

Provided that—

(a) A person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused; and

(b) Any child whose evidence is received as aforesaid and who shall wilfully give false evidence shall be liable to be indicted and tried for such offence, and on conviction thereof may be adjudged such punishment as is provided for by section eleven of the Summary Jurisdiction Act, 1879, in the case of juvenile offenders, or in Ireland by section four of the Summary Jurisdiction over Children (Ireland) Act, 1884, in the case of children.

(2.) This section shall not apply to Scotland.

17. Where a person is charged with an offence under this Act, . . . or any offence under the Employment of Children Act, 1903, in respect of a child who is alleged in the charge or indictment to be under any specified age, and the child appears to the court to be under that age, such child shall for the purposes of this Act, and the Employment of Children Act, 1903, be deemed to be under that age, unless the contrary is proved.

18.—(3.) A person shall not be summarily convicted of an offence under this Act, . . . unless the offence was wholly or partly committed within six months before the information was laid; but, subject as aforesaid, evidence may be taken of acts constituting, or contributing to constitute, the offence, and committed at any previous time.

23.—(3.) For the purposes of this Act—

Any person who is the parent of a child shall be presumed to have the custody of the child; and

Any person to whose charge a child is committed by its parent shall be presumed to have charge of the child; and

Any other person having actual possession or control of a child shall be presumed to have the care of the child.

24. In any proceedings under this Act a copy of an entry in the wages book of any employer of labour, or, if no wages book be kept, a written statement signed by such employer, or by his foreman, shall be *primâ facie* evidence that the wages therein

entered, or stated as having been paid to any person, have in fact been so paid: Provided that such copy or statement has been signed by such employer, or his foreman, and that the signature of such employer, or foreman, has been witnessed by the person producing the said copy or statement.

OATHS ACT, 1909.

(9 EDW. VII. c. 39.)

2.—(1.) Any oath may be administered and taken in the form and manner following:—

The person taking the oath shall hold the New Testament, or, in the case of a Jew, the Old Testament, in his uplifted hand, and shall say or repeat after the officer administering the oath the words "I swear by Almighty God that . . . ," followed by the words of the oath prescribed by law.

(2.) The officer shall (unless the person about to take the oath voluntarily objects thereto, or is physically incapable of so taking the oath) administer the oath in the form and manner aforesaid without question:

Provided that, in the case of a person who is neither a Christian nor a Jew, the oath shall be administered in any manner which is now lawful.

3. In this Act the word "officer" shall mean and include any and every person duly authorised to administer oaths.

CRIMINAL JUSTICE ADMINISTRATION ACT, 1914.

(4 & 5 GEO. V. c. 58.)

28.—(1) The record or extract by which a conviction may be proved under section eighteen of the Prevention of Crimes Act, 1871, may in the case of a summary conviction consist of a copy of the minute or memorandum of the conviction entered in the register required to be kept under section twenty-two of the Summary Jurisdiction Act, 1879, purporting to be signed by the clerk of the court by whom the register is kept.

(2) The provisions of section thirty of the Children Act, 1908 (which enables the evidence of a child of tender years to be received though not given on oath), shall apply to proceedings against persons for offences not mentioned in that section, in like manner as they apply in respect of proceedings against persons for offences mentioned in that section.

(3) The wife or husband of a person charged with bigamy may be called as a witness either for the prosecution or defence and without the consent of the person charged.

(4) In any proceedings before a court of summary jurisdiction to enforce the payment of a sum of money adjudged by that or any other court of summary jurisdiction to be paid by one person to another person, then—

(*a*) if the person to whom the sum is ordered to be paid was an officer of a court of summary jurisdiction, the production of a certificate purporting to be signed by that officer that the sum has not been paid to him; and

(*b*) in any other case the production of a statutory declaration to a like effect purporting to be made by the person to whom the sum is ordered to be paid;

shall be evidence of the facts therein stated, unless the court requires such officer or other person to be called as a witness.

29. The provisions of section sixteen of the Indictable Offences Act, 1848, section seven of the Summary Jurisdiction Act, 1848, and section thirty-six of the Summary Jurisdiction Act, 1879, enabling a justice to issue a summons to any witness to attend to give evidence before a court of summary jurisdiction, shall be deemed to include the power to summon and require a witness to produce to such court books, plans, papers, documents, articles, goods, and things likely to be material evidence on the hearing of any charge, information, or complaint, and the provisions of those sections relating to the neglect or refusal of a witness, without just excuse, to attend to give evidence, or to be sworn, or to give evidence, shall apply accordingly.

LARCENY ACT, 1916.

(6 & 7 Geo. V. c. 50.)

43.—(1) Whenever any person is being proceeded against for receiving any property, knowing it to have been stolen, or for having in his possession stolen property, for the purpose of proving guilty knowledge there may be given in evidence at any stage of the proceedings—

(*a*) the fact that other property stolen within the period of twelve months preceding the date of the offence charged was found or had been in his possession;

(*b*) the fact that within the five years preceding the date of the offence charged he was convicted of any offence involving fraud or dishonesty.

This last-mentioned fact may not be proved unless—

(i.) seven days' notice in writing has been given to the offender that proof of such previous conviction is intended to be given;

(ii.) evidence has been given that the property in respect of which the offender is being tried was found or had been in his possession.

(2) No person shall be liable to be convicted of any offence against sections six, seven subsection (1), twenty, twenty-one, and

twenty-two of this Act upon any evidence whatever in respect of any act done by him, if at any time previously to his being charged with such offence he has first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which has been *boná fide* instituted by any person aggrieved.

(3) In any proceedings in respect of any offence against sections six, seven subsection (1), twenty, twenty-one, and twenty-two of this Act, a statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy shall not be admissible in evidence against that person.

II. RULES OF COURT.

(i.) RULES OF THE SUPREME COURT, 1883.

ORDER XXX., RR. 1 (a) (b), 7.

Summons for Directions.

1.—(a) Except in the cases mentioned in paragraph (d) the plaintiff in every action shall take out a summons for directions returnable in not less than four days.

(b) Such summons shall be taken out after appearance and before the plaintiff takes any fresh step in the action other than application for an injunction, or for a receiver, or the entering of judgment in default of defence under Order XXVII.

7. On the hearing of the summons, the court or a judge may order that evidence of any particular fact, to be specified in the order, shall be given by statement on oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries or otherwise as the court or judge may direct (*a*).

ORDER XXXI., RR. 1, 2, 5, 6, 8, 11–15, 17, 18, 19A, 20.

Discovery and Inspection.

1. In any cause or matter the plaintiff or defendant by leave of the court or a judge may deliver interrogatories in writing for the examination of the opposite parties, or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer: Provided that interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

2. A copy of the interrogatories proposed to be delivered shall be delivered with the summons or notice of application for leave to deliver them at least two clear days before the hearing thereof (unless in any case the court or judge shall think fit to dispense with this requirement) and the particular interrogatories sought to be delivered shall be submitted to and considered by the court or judge. In deciding upon such application, the court or judge shall take into acccunt any offer, which may be made by the party sought to be interrogated to deliver particulars, or to make admissions, or to produce documents relating to any matter in

(*a*) The object of this rule is to dispense, to a certain limited extent, with the technical rules of evidence (*Baerlein* v. *Chartered Mercantile Bank*, [1895] 2 Ch. 488).

question, and leave shall be given as to such only of the interrogatories as shall be considered necessary either for disposing fairly of the cause or matter or for saving costs.

5. If any party to a cause or matter be a body corporate or a joint-stock company, whether incorporated or not, or any other body of persons, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly.

6. Any objection to answering any one or more of several interrogatories on the ground that it or they is or are scandalous or irrelevant, or not *bonâ fide* for the purpose of the cause or matter, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer.

8. Interrogatories shall be answered by affidavit to be filed within ten days, or within such other time as a judge may allow.

11. If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the court or a judge for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further, either by affidavit or by *vivâ voce* examination, as the judge may direct.

12. Any party may, without filing any affidavit, apply to the court or a judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the court or judge may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or make such order, either generally or limited to certain classes of documents, as may in their or his discretion be thought fit. Provided that discovery shall not be ordered when and so far as the court or judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

13. The affidavit, to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which, if any, of the documents therein mentioned he objects to produce. . . .

13A. On the hearing of any application for discovery of documents the court or judge, in lieu of ordering an affidavit of documents to be filed, may order that the party from whom discovery is sought shall deliver to the opposite party a list of the documents which are or have been in his possession, custody or power relating to the matters in question. Such list shall as nearly as may be follow the form of the affidavit in the Form No. 8 in Appendix B. Provided that the ordering of such list shall not preclude the court or judge from afterwards ordering the party to make and file an affidavit of documents.

14. It shall be lawful for the court or a judge, at any time during the pendency of any cause or matter, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in

such cause or matter, as the court or judge shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just.

15. Every party to a cause or matter shall be entitled, at any time, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the court or a judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the court or judge shall deem sufficient for not complying with such notice, in which case the court or judge may allow the same to be put in evidence on such terms as to costs and otherwise as the court or judge shall think fit.

17. The party to whom such notice is given shall, within two days from the receipt of such notice, if all the documents therein referred to have been set forth by him in such affidavit as is mentioned in rule 13, or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within four days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, or in the case of bankers' books or other books of account, or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground. . . .

18.—(1.) If the party served with notice under rule 15 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his solicitor, the court or judge may, on the application of the party desiring it, make an order for inspection in such place and in such manner as he may think fit: Provided that the order shall not be made when and so far as the court or a judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

(2.) Any application to inspect documents, except such as are referred to in the pleadings, particulars, or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The court or judge shall not make such order for inspection of such documents when and so far as the court or judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

19A.—(1.) Where inspection of any business books is applied for, the court or a judge may, if they or he shall think fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any

and what erasures, interlineations, or alterations. Provided that, notwithstanding that such copy has been supplied, the court or a judge may order inspection of the book from which the copy was made.

(2.) Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the court or a judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege.

(3.) The court or a judge may, on the application of any party to a cause or matter at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any particular document or documents or any class or classes of documents specified or indicated in the application, is or are, or has or have at any time been, in his possession, custody or power; and, if not then in his possession, custody or power, when he parted with the same, and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had, in his possession, custody or power the particular document or documents or the class or classes of documents specified or indicated in the application, and that they relate to the matters in question in the cause or matter, or to some or one of them.

20. If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the court or a judge may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the cause or matter, or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

ORDER XXXVII., RR. 1-5, 6A-25, 35-38.

I. EVIDENCE GENERALLY.

1. In the absence of any agreement in writing between the solicitors of all parties, and subject to these rules, the witnesses at the trial of any action or at any assessment of damages shall be examined *viva voce* and in open court, but the court or a judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the court or judge may think reasonable, or that any witness whose attendance in court ought for some sufficient cause to be dispensed with be examined by interrogatories or otherwise before a commissioner or examiner; provided that, where it appears to the court or judge that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit (*b*).

(*b*) See sect. 20 of the Judicature Act, 1875 (38 & 39 Vict. c. 77).

2. In default actions *in rem*, and in references in Admiralty actions, evidence may be given by affidavit.

3. An order to read evidence taken in another cause or matter shall not be necessary, but such evidence may, saving all just exceptions, be read on *ex parte* applications by leave of the court or a judge, to be obtained at the time of making any such application, and in any other case upon the party desiring to use such evidence giving two days' previous notice to the other parties of his intention to read such evidence.

4. Office copies of all writs, records, pleadings, and documents filed in the High Court of Justice shall be admissible in evidence in all causes and matters and between all persons or parties, to the same extent as the original would be admissible.

II. EXAMINATION OF WITNESSES.

5. The court or a judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before the court or judge or any officer of the court, or any other person, and at any place, of any witness or person, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the court or a judge may direct.

6. [*Provides the form of an order for a commission to examine witnesses.*]

6A. If in any case the court or a judge shall so order, there shall be issued a request to examine witnesses in lieu of a commission. . . .

7. The court or a judge may in any cause or matter at any stage of the proceedings order the attendance of any person for the purpose of producing any writings or other documents named in the order which the court or judge may think fit to be produced: Provided that no person shall be compelled to produce under any such order any writing or other document which he could not be compelled to produce at the hearing or trial.

8. Any person wilfully disobeying any order requiring his attendance for the purpose of being examined or producing any document shall be deemed guilty of contempt of court, and may be dealt with accordingly.

9. Any person required to attend for the purpose of being examined or of producing any document, shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in court.

10. Where any witness or person is ordered to be examined before any officer of the court, or before any person appointed for the purpose, the person taking the examination shall be furnished by the party on whose application the order was made with a copy of the writ and pleadings, if any, or with a copy of the documents necessary to inform the person taking the examination of the questions at issue between the parties.

11. The examination shall take place in the presence of the parties, their counsel, solicitors, or agents, and the witnesses shall be subject to cross-examination and re-examination.

12. The depositions taken before an officer of the court, or before

any other person appointed to take the examination, shall be taken down in writing by or in the presence of the examiner, not ordinarily by question and answer, but so as to represent as nearly as may be the statement of the witness, and when completed shall be read over to the witness and signed by him in the presence of the parties, or such of them as may think fit to attend. If the witness shall refuse to sign the depositions, the examiner shall sign the same. The examiner may put down any particular question or answer if there should appear any special reason for doing so, and may put any question to the witness as to the meaning of any answer, or as to any matter arising in the course of the examination. Any questions which may be objected to shall be taken down by the examiner in the depositions, and he shall state his opinion thereon to the counsel, solicitors, or parties, and shall refer to such statement in the depositions, but he shall not have power to decide upon the materiality or relevancy of any question.

13. If any person duly summoned by *subpœna* to attend for examination shall refuse to attend, or if, having attended, he shall refuse to be sworn or to answer any lawful question, a certificate of such refusal, signed by the examiner, shall be filed at the central office, and thereupon the party requiring the attendance of the witness may apply to the court or a judge *ex parte* or on notice for an order directing the witness to attend, or to be sworn, or to answer any question, as the case may be.

14. If any witness shall object to any question which may be put to him before an examiner, the question so put, and the objection of the witness thereto, shall be taken down by the examiner, and transmitted by him to the central office to be there filed, and the validity of the objection shall be decided by the court or a judge.

15. In any case under the two last preceding rules, the court or a judge shall have power to order the witness to pay any costs occasioned by his refusal or objection.

16. When the examination of any witness before any examiner shall have been concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the central office, and there filed.

17. The person taking the examination of a witness under these rules may, and if need be shall, make a special report to the court touching such examination and the conduct or absence of any witness or other person thereon, and the court or a judge may direct such proceedings and make such order as upon the report they or he may think just.

18. Except where by this order otherwise provided, or directed by the court or a judge, no deposition shall be given in evidence at the hearing or trial of the cause or matter without the consent of the party against whom the same may be offered, unless the court or judge is satisfied that the deponent is dead, or beyond the jurisdiction of the court or unable from sickness or other infirmity to attend the hearing or trial, in any of which cases the depositions certified under the hand of the person taking the examination shall be admissible in evidence saving all just exceptions without proof of the signature to such certificate.

19. Any officer of the court, or other person directed to take the examination of any witness or person, may administer oaths.

20. Any party in any cause or matter may by *subpœna ad testificandum* or *duces tecum* require the attendance of any witness before an officer of the court, or other person appointed to take the examination, for the purpose of using his evidence upon any proceeding in the cause or matter in like manner as such witness would be bound to attend and be examined at the hearing or trial; and any party or witness having made an affidavit to be used or which shall be used on any proceeding in the cause or matter shall be bound on being served with such *subpœna* to attend before such officer or person for cross-examination.

21. Evidence taken subsequently to the hearing or trial of any cause or matter shall be taken as nearly as may be in the same manner as evidence taken at or with a view to a trial.

22. The practice with reference to the examination, cross-examination, and re-examination of witnesses at a trial shall extend and be applicable to evidence taken in any cause or matter at any stage.

23. The practice of the court with respect to evidence at a trial, when applied to evidence to be taken before an officer of the court or other person in any cause or matter after the hearing or trial, shall be subject to any special directions which may be given in any case.

24. No affidavit or deposition filed or made before issue joined in any cause or matter shall without special leave of the court or a judge be received at the hearing or trial thereof, unless within one month after issue joined, or within such longer time as may be allowed by special leave of the court or a judge, notice in writing shall have been given by the party intending to use the same to the opposite party of his intention in that behalf.

25. All evidence taken at the hearing or trial of any cause or matter may be used in any subsequent proceedings in the same cause or matter.

III. SUBPŒNA.

26 to 34B. [*Deal with the issuing, form, and service, of a subpœna.*]

IV. PERPETUATING TESTIMONY.

35. Any person who would under the circumstances alleged by him to exist become entitled, upon the happening of any future event, to any honour, title, dignity, or office, or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, may commence an action to perpetuate any testimony which may be material for establishing such right or claim.

36. In all actions to perpetuate testimony touching any honour, title, dignity, or office, or any other matter or thing in which the Crown may have any estate or interest, the Attorney-General may be made a defendant, and in all proceedings in which the depositions taken in any such action, in which the Attorney-General was so made a defendant, may be offered in evidence, such depositions shall be admissible notwithstanding any objection to such depositions upon the ground that the Crown was not a party to the action in which such depositions were taken.

37. Witnesses shall not be examined to perpetuate testimony unless an action has been commenced for the purpose.

38. No action to perpetuate the testimony of witnesses shall be set down for trial.

ORDER XXXVIII., RR. 1–30.

I. AFFIDAVITS AND DEPOSITIONS.

1. Upon any motion, petition, or summons, evidence may be given by affidavit; but the court or a judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit.

2. Every affidavit shall be intituled in the cause or matter in which it is sworn; but in every case in which there are more than one plaintiff or defendant, it shall be sufficient to state the full name of the first plaintiff or defendant respectively, and that there are other plaintiffs or defendants, as the case may be; and the costs occasioned by any unnecessary prolixity in any such title shall be disallowed by the taxing officer.

3. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same (*c*).

4. Affidavits sworn in England shall be sworn before a judge, district registrar, commissioner to administer oaths, or officer empowered under these rules to administer oaths.

5. Every commissioner to administer oaths shall express the time when and the place where he shall take any affidavit, or the acknowledgment of any deed, or recognisance; otherwise the same shall not be held authentic, nor be admitted to be filed or enrolled without the leave of the court or a judge; and every such commissioner shall express the time when, and the place where, he shall do any other act incident to his office.

6. All examinations, affidavits, declarations, affirmations, and attestations of honour in causes or matters depending in the High Court, and also acknowledgments required for the purpose of enrolling any deed in the central office, may be sworn and taken in Scotland or Ireland or the Channel Islands, or in any colony, island, plantation, or place under the dominion of Her Majesty in foreign parts, before any judge, court, notary public, or person lawfully authorised to administer oaths in such country, colony, island, plantation, or place respectively, or before any of Her Majesty's consuls or vice-consuls in any foreign parts out of Her Majesty's dominions; and the judges and other officers of the High Court shall take judicial notice of the seal or signature, as the case may be, of any such court, judge, notary public, person, consul, or vice-consul, attached, appended, or subscribed to any such examinations, affidavits, affirmations, attestations of honour, declarations, acknowledgments, or to any other deed or document.

(*c*) See *ante*, p. 608.

7. Every affidavit shall be drawn up in the first person, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject. Every affidavit shall be written or printed bookwise. No costs shall be allowed for any affidavit or part of an affidavit substantially departing from this rule.

8. Every affidavit shall state the description and true place of abode of the deponent.

9. In every affidavit made by two or more deponents the names of the several persons making the affidavit shall be inserted in the jurat, except that if the affidavit of all the deponents is taken at one time by the same officer it shall be sufficient to state that it was sworn by both (or all) of the "above-named" deponents.

10. Every affidavit or other proof used in Admiralty actions shall be filed in the Admiralty registry: every affidavit used in Probate actions shall be filed in the Probate registry: every affidavit used on the Crown side of the King's Bench Division shall be filed in the Crown Office Department: every affidavit used in a cause or matter proceeding in a district registry shall be filed there: and every other affidavit used shall be filed in the central office. There shall be indorsed on every affidavit a note showing on whose behalf it is filed, and no affidavit shall be filed or used without such note, unless the court or a judge shall otherwise direct.

11. The court or a judge may order to be struck out from any affidavit any matter which is scandalous, and may order the costs of any application to strike out such matter to be paid as between solicitor and client.

12. No affidavit having in the jurat or body thereof any interlineation, alteration, or erasure, shall without leave of the court or a judge be read or made use of in any matter depending in court unless the interlineation or alteration (other than by erasure) is authenticated by the initials of the officer taking the affidavit, or, if taken at the central office, either by his initials or by the stamp of that office, nor in the case of an erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are re-written and signed or initialled in the margin of the affidavit by the officer taking it.

13. Where an affidavit is sworn by any person who appears to the officer taking the affidavit to be illiterate or blind, the officer shall certify in the jurat that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his signature in the presence of the officer. No such affidavit shall be used in evidence in the absence of this certificate, unless the court or a judge is otherwise satisfied that the affidavit was read over to and appeared to be perfectly understood by the deponent.

14. The court or a judge may receive any affidavit sworn for the purpose of being used in any cause or matter, notwithstanding any defect by misdescription of parties or otherwise in the title or jurat, or any other irregularity in the form thereof, and may direct a memorandum to be made on the document that it has been so received.

15. In cases in which by the present practice an original affidavit is allowed to be used, it shall before it is used be stamped with a proper filing stamp, and shall at the time when it is used be

delivered to and left with the proper officer in court or in chambers, who shall send it to be filed. An office copy of an affidavit may in all cases be used, the original affidavit having been previously filed, and the copy duly authenticated with the seal of the office.

16. No affidavit shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used, or before any agent or correspondent of such solicitor, or before the party himself (*d*).

17. Any affidavit which would be insufficient if sworn before the solicitor himself shall be insufficient if sworn before his clerk or partner.

18. Where a special time is limited for filing affidavits, no affidavit filed after that time shall be used, unless by leave of the court or a judge.

19. Except by leave of the court or a judge no order made *ex parte* in court founded on any affidavit shall be of any force unless the affidavit on which the application was made was actually made before the order was applied for, and produced or filed at the time of making the motion.

19A. The consent of a new trustee to act shall be sufficiently evidenced by a written consent signed by him and verified by the signature of his solicitor. . . .

II. AFFIDAVITS AND EVIDENCE IN CHAMBERS.

20. The party intending to use any affidavit in support of any application made by him in chambers in the Chancery Division shall give notice to the other parties concerned of his intention in that behalf.

21. All affidavits which have been previously made and read in court upon any proceeding in a cause or matter may be used before the judge in chambers.

22. Every alteration in an account verified by affidavit to be left at chambers shall be marked with the initials of the commissioner or officer before whom the affidavit is sworn, and such alterations shall not be made by erasure.

23. Accounts, extracts from parish registers, particulars of creditors' debts, and other documents referred to by affidavit, shall not be annexed to the affidavit, or referred to in the affidavit as annexed, but shall be referred to as exhibits.

24. Every certificate on an exhibit referred to in an affidavit signed by the commissioner or officer before whom the affidavit is sworn shall be marked with the short title of the cause or matter.

III. TRIAL ON AFFIDAVIT.

25. Within fourteen days after a consent for taking evidence by affidavit as between the parties has been given, or within such time as the parties may agree upon, or the court or a judge may allow, the plaintiff shall file his affidavits and deliver to the defendant or his solicitor a list thereof.

26. The defendant within fourteen days after delivery of such list, or within such time as the parties may agree upon, or the

(*d*) See Commissioners for Oaths Act, 1889 (52 Vict. c. 10), s. 1.

court or a judge may allow, shall file his affidavits and deliver to the plaintiff or his solicitor a list thereof.

27. Within seven days after the expiration of the last-mentioned fourteen days, or such other time as aforesaid, the plaintiff shall file his affidavits in reply, which affidavits shall be confined to matters strictly in reply, and shall deliver to the defendant or his solicitor a list thereof.

28. When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed, a notice in writing, requiring the production of the deponent for cross-examination at the trial, such notice to be served at any time before the expiration of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the court or a judge may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the special leave of the court or a judge. The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production.

29. The party to whom such notice as is mentioned in the last preceding rule is given shall be entitled to compel the attendance of the deponent for cross-examination in the same way as he might compel the attendance of a witness to be examined.

30. When the evidence under this order is taken by affidavit, such evidence shall be printed, and the notice of trial shall be given at the same time after the close of the evidence as in other cases is by these rules provided after the close of the pleadings: provided that other affidavits may be printed if all the parties interested consent thereto, or the court or a judge so order: provided also that this rule shall not apply in the Probate, Divorce and Admiralty Division to default actions *in rem*, or references in actions, or actions for limitation of liability, unless the court or a judge shall otherwise order.

ORDER LVIII., RR. 11–13.

APPEALS TO THE COURT OF APPEAL.

11. When any question of fact is involved in an appeal, the evidence taken in the court below bearing on such question shall, subject to any special order, be brought before the Court of Appeal as follows:

(a) As to any evidence taken by affidavit, by the production of printed copies of such of the affidavits as have been printed, and office copies of such of them as have not been printed:

(b) As to any evidence given orally, by the production of a copy of the judge's notes, or such other materials as the court may deem expedient.

12. Where evidence has not been printed in the court below the court below or a judge thereof, or the Court of Appeal or a judge thereof, may order the whole or any part thereof to be printed for the purpose of the appeal. Any party printing evidence for the purpose of an appeal without such order shall bear the

costs thereof, unless the Court of Appeal or a judge thereof shall otherwise order.

13. If, upon the hearing of an appeal, a question arise as to the ruling or direction of the judge to a jury or assessors, the court shall have regard to verified notes or other evidence, and to such other materials as the court may deem expedient.

(ii.) THE BANKRUPTCY RULES, 1915.

17.—(1.) In the High Court the senior bankruptcy registrar, and in a county court the registrar, shall file a copy of each issue of the "London Gazette," and whenever the Gazette contains any advertisement relating to any matter under the Act in such court, he shall at the same time file with the proceedings in the matter a memorandum referring to and giving the date of such advertisement.

(2.) In the case of an advertisement in a local paper, the registrar shall in like manner file a copy of the paper and a memorandum referring to and giving the date of such advertisement.

(3.) For this purpose one copy of each local paper, in which any advertisement relating to any matter under the Act in such court is inserted, shall be left with the registrar by the person inserting the advertisement.

(4.) The memorandum by the registrar shall be *primâ facie* evidence that the advertisement to which it refers was duly inserted in the issue of the Gazette or paper mentioned in it.

(5.) Where, in the exercise of their functions under the Act or Rules, the Board of Trade or the official receiver require to inspect or use the file of proceedings in any matter, the registrar shall (unless the file is at the time required for use in court or by him) on request transmit the file of proceedings to the Board of Trade or official receiver, as the case may be.

61. A subpœna for the attendance of a witness shall be issued by the court at the instance of an official receiver, a trustee, a creditor, a debtor, or any applicant or respondent in any matter, with or without a clause requiring the production of books, deeds, papers, documents, and writings in his possession or control, and in such subpœna the names of three witnesses may be inserted.

66. The court may, in any matter where it shall appear necessary for the purposes of justice, make an order for the examination upon oath before the court or any officer of the court, or any other person, and at any place, of any witness or person, and may empower any party to any such matter to give such deposition in evidence therein on such terms (if any) as the court may direct.

69. Any person wilfully disobeying any subpœna or order requiring his attendance for the purpose of being examined or producing any document shall be deemed guilty of contempt of court, and may be dealt with accordingly.

70. The court may, in any matter, at any stage of the proceedings,

order the attendance of any person for the purpose of producing any writings or other documents named in the order, which the court may think fit to be produced.

72. Any witness (other than the debtor) required to attend for the purpose of being examined, or of producing any document, shall be entitled to the like conduct money and payment for expenses and loss of time, as upon attendance at a trial in court.

73. Any party to any proceeding in court may, with the leave of the court, administer interrogatories to, or obtain discovery of documents from, any other party to such proceeding. Proceedings under this rule shall be regulated as nearly as may be by the Rules of the Supreme Court for the time being in force in relation to discovery and inspection. An application for leave under this rule may be made *ex parte*.

(iii.) THE COUNTY COURT RULES, 1903 TO 1920.

ORDER XVI., RR. 1–22.

DISCOVERY AND INSPECTION.

1 Any party to any action or matter may, without filing an affidavit, by leave of the court (*a*), deliver interrogatories in writing for the examination of any one or more of the opposite parties, and such interrogatories when delivered shall have a note at the foot thereof, stating which of such interrogatories each of such parties is to answer: Provided that interrogatories which do not relate to any question in the action or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

2. If leave is granted, an order shall be drawn up by the registrar and served by the applicant on the party against whom the order is made. Such order shall be according to the form in the Appendix, and shall specify the number of days within which the interrogatories are to be delivered by the applicant, and also the time within which the affidavit in answer is to be filed.

3. On an application for leave to deliver interrogatories the particular interrogatories proposed to be delivered shall be submitted to the court. In deciding upon such application, the court shall take into account any offer which may be made by the party sought to be interrogated, to deliver particulars, or to make admissions, or to produce documents relating to the subject in question, or any of them; and shall also consider whether the application has been made too early in the proceedings in the action or matter, or too late to allow of the answers being used at the hearing; and leave shall be given as to such only of the interrogatories submitted as the court considers necessary either for disposing fairly of the action or matter, or for saving costs.

4. In adjusting the costs of the action or matter inquiry shall, at the instance of any party, be made into the propriety of exhibiting interrogatories; and if it is the opinion of the registrar on taxation,

(*a*) By Order LV. "court" includes a judge or registrar exercising the powers of the court in chambers as well as in open court.

or of the judge, either with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault.

5. Interrogatories shall be according to the form in the Appendix, with such variations as circumstances may require.

6. If any party to an action or matter be a body corporate or a joint stock company, whether incorporated or not, or any other body of persons empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly.

7. Any objection to answer any one or more of several interrogatories, on the ground that it or they is or are scandalous or irrelevant, or not *bonâ fide* for the purpose of the action or matter, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer.

8. Interrogatories shall be answered by affidavit according to the form in the Appendix, with such variations as circumstances may require. Such affidavit shall be filed and a copy thereof delivered to the party interrogating within the time named in the order giving leave to interrogate.

9. If any person interrogated omits to answer, or answers insufficiently, the party interrogating, after giving to such person two clear days' notice of the time and place at which he intends to apply, may apply to the court for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer, or to answer further, either by affidavit or by *vivâ voce* examination before the court, as the court may direct.

10. Any party to any action or matter may, without filing any affidavit, apply to the court for an order directing any other party to the action or matter to make discovery on oath of the documents which are or have been in his possession or power relating to any question therein. On the hearing of such application the court may either refuse or adjourn the same, if satisfied that such discovery is not necessary or not necessary at that stage of the action or matter, or make such order, either generally or limited to certain classes of documents, as the court may in its discretion think fit. Provided that discovery shall not be ordered when and so far as the court is of opinion that it is not necessary either for disposing fairly of the action or matter, or for saving costs. If an order is made it shall be drawn up by the registrar and served by the applicant on the party against whom the order is made. Such order shall be according to the form in the Appendix, and shall specify the time within which the affidavit in answer is to be filed.

11. The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made shall specify which, if any, of the documents therein mentioned he objects to produce, and on what grounds and it shall be according to the form in the Appendix, with such variations as circumstances

may require. Such affidavit shall be filed and a copy thereof delivered to the party who obtains the order within the time named in the order.

12. The court may, at any time during the pendency of any action or matter, order the production upon oath, by any party thereto, of such of the documents in his possession or power relating to any question in such action or matter as the court may direct; and the court may deal with such documents, when produced, in such manner as may be just.

13. Any party to an action or matter may at any time give notice in writing to any other party in whose particulars, notices or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, and to permit him to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such action or matter, unless he satisfies the court that such document relates only to his own title, he being a defendant to the action or matter, or that he had some other cause or excuse which the court deems sufficient for not complying with such notice; in which case the court may allow the same to be put in evidence on such terms as to costs and otherwise as the court may think fit.

14. Notice to any party to produce any documents under the last preceding rule shall be according to the form in the Appendix, with such variations as circumstances may require.

15. The party to whom such notice is given shall, within two days from the receipt of such notice, if all the documents therein referred to have been set forth by him in such affidavit as is mentioned in rule 11 of this order, or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within four days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, or in the case of bankers' books or other books of account, or books in constant use for the purposes of any trade or business, or in case the party is not acting by a solicitor, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what grounds. Such notice shall be according to the form in the Appendix, with such variations as circumstances may require.

16.—(1.) If any party served with notice under rule 13 of this order omits to give such notice of a time for inspection, or objects to give inspection, or offers inspection elsewhere than is provided by rule 15, the court may, on the application of the party desiring it, make an order for inspection at such place and in such manner as the court may think fit: Provided that the order shall not be made when and so far as the court is of opinion that it is not necessary either for disposing fairly of the action or matter, or for saving costs.

(2.) Any application to inspect documents, except such as are referred to in the particulars, notices, or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled

to inspect them, and that they are in the possession or power of the other party. The court shall not make an order for inspection of such documents when and so far as the court is of opinion that it is not necessary either for disposing fairly of the action or matter, or for saving costs.

17. In any pending action or matter an order upon the lord of a manor to allow limited inspection of the court rolls may be made on the application of a copyhold tenant supported by an affidavit that he has applied for inspection, and that the same has been refused.

18. In any action against or by a sheriff or high bailiff, or other officer discharging the like functions, in respect of any matters connected with the execution of his office, the court may, on the application of either party, order that the affidavit to be made in answer either to interrogatories or to an order for discovery shall be made by the officer actually concerned.

19.—(1.) Where inspection of any business books is applied for, the court may, if it thinks fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations, or alterations. Provided that, notwithstanding that such copy has been supplied, the court may order inspection of the book from which the copy was made.

(2.) Where on an application for an order for inspection privilege is claimed for any document, the court may inspect the document for the purpose of deciding as to the validity of the claim of privilege.

(3.) The court may, on the application of any party to an action or matter at any time, and whether an affidavit of documents has or has not been already ordered or made, make an order requiring any other party to state by affidavit whether any specific documents, to be specified in the application, are or have at any time been in his possession or power; and if not then in his possession, when he parted with the same, and what has become thereof. Such application shall be made on affidavit stating that in the belief of the deponent the party against whom the application is made has or has at some time had in his possession or power the documents specified in the application, and that they relate to the matters in question in the action or matter, or to some of them,

20. If a party from whom discovery of any kind or inspection is sought objects to the same or any part thereof, the court may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the action or matter, or that for any other reason it is desirable that any issue or question in dispute in the action or matter should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

21. If any party fails to comply with an order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff, be liable to have his action stayed until the order is complied with, or dis-

missed for want of prosecution, and, if a defendant, be debarred from defending until the order is complied with; and the party applying for discovery or inspection may apply to the court for an order to that effect, and an order may be made accordingly.

22. In every action or matter, the costs of discovery, by interrogatories or otherwise, shall, unless otherwise ordered by the court, be secured in the first instance as provided by rule 23 of this order, by the party seeking such discovery, and shall be allowed as part of his costs, where, and only where, such discovery appears to the judge at the trial, or, if there is no trial, to the registrar on taxation, to have been reasonably asked for.

ORDER XVIII., RR. 1, 2, 5–22, 24–33.

EVIDENCE.

1. Except where otherwise provided by these rules, the evidence of witnesses on the trial of any action or hearing of any matter shall be taken orally on oath; and where by these rules evidence is required or permitted to be taken by affidavit such evidence shall nevertheless be taken orally on oath if the court, on any application before or at the trial or hearing, so directs.

2. The judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the trial or hearing, on such conditions as he may think reasonable, or that any witness whose attendance in court ought for some sufficient cause to be dispensed with be examined by interrogatories or otherwise before an examiner: Provided that, where it appears to the judge that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.

3, 3A, and 4. [*Deal with the issue and service of summonses to witnesses.*]

5. Where a witness served with a summons containing a direction for the production of any documents at the trial does not produce the same, the judge may, upon admission or proof that the summons was served within a reasonable time, and that such documents are in the possession or power or under the control of the party so served, and that they relate to the matter then pending before him, make an order for their production by the witness, and may deal with them, when produced, and with all costs occasioned by their non-production, as may be just: Provided that nothing herein shall prevent the receiving of secondary evidence where admissible.

6. Where a party desires to give in evidence any document, he may, not less than ten clear days before the trial, give notice to any other party in the action or matter who is competent to make admissions requiring him to inspect and admit such document; and if such other party does not within five days after receiving such notice make such admission, any expense of proving the same at the trial shall be paid by him, whatever may be the result, unless the court otherwise orders; and no costs of proving any document

shall be allowed unless such notice has been given, except in cases where, in the opinion of the judge at the trial, or the registrar on taxation, the omission to give such notice has been a saving of expense (*b*).

7. Notices to admit or to produce documents shall be according to the forms in the Appendix, with such variations as circumstances may require.

An affidavit of the party, or his solicitor, or of some person in the permanent and exclusive employ of either of them, of the service of any notice to admit or to produce, and of the time when it was served, with a copy of the notice to admit or to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served.

8. If a notice to admit or produce comprises documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice.

9. Where any documents which would, if duly proved, be admissible in evidence are produced to the court from proper custody, they shall be read without further proof, if, in the opinion of the court, they appear genuine, and if no objection is taken thereto; and if the admission of any documents so produced is objected to, the court may adjourn the hearing for the proof of the documents, and the party objecting shall pay the costs caused by such objection, in case the documents shall afterwards be proved, unless the court otherwise orders.

10. Where an instrument which may be legally stamped after its execution is produced as evidence, and the same is unstamped or insufficiently stamped, it shall not be received in evidence until the party desirous of giving the instrument in evidence produces to the court the receipt of the registrar for the amount of the unpaid duty, and the penalty payable by law on stamping the same, and the sum of one pound.

11. Where a party desires to use at the trial an affidavit by any particular witness, or an affidavit as to particular facts as to which no order has been made under rule 2 of this order, he may, not less than eight clear days before the trial, give a notice, with a copy of such affidavit annexed, to the party against whom such affidavit is to be used; and unless such last-mentioned party shall four clear days at least before the trial give notice to the other party that he objects to the use of such affidavit, he shall be taken to have consented to the use thereof, unless the judge otherwise orders; and the judge may make such order as he may think fit as to the costs of or incidental to any such objection (*c*).

12. All evidence taken at the trial of any action or matter may be used in any subsequent proceedings in the same action or matter.

13. Evidence taken subsequently to the trial or hearing of any action or matter shall be taken as nearly as may be in the same manner as evidence taken at or with a view to a trial or hearing.

14. The practice with reference to the examination, cross-examination, and re-examination of witnesses at a trial shall

(*b*) As amended by Order XXIIA, r. 17.
(*c*) *Ibid.*, r. 18.

extend and be applicable to evidence taken in any action or matter at any stage.

15. The practice of the court with respect to evidence at a trial, when applied to evidence to be taken before an officer of the court or other person in any action or matter after the trial or hearing, shall be subject to any special directions which may be given in any case.

16. Any party may, at the trial of an action or matter, use in evidence any one or more of the answers, or any part of an answer, of the opposite party to interrogatories, without putting in the others, or the whole of such answer: Provided that in such case the judge may look at the whole of the answers, and if he is of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in.

17. Affidavits and depositions shall be read as the evidence of the person by whom they are used.

EXAMINATIONS.

18. The court may in any action or matter where it appears necessary for the purposes of justice, make an order for the examination upon oath before the court or any officer of the court, or any other person and at any place in England or Wales, of any witness or person, and may empower any party to any such action or matter to give such deposition in evidence therein on such terms, if any, as the court may direct.

19. Where any witness or person mentioned in the last preceding rule resides out of the district of the court, the judge may appoint the registrar of the court in the district of which such witness or person resides to take the examination.

20. The court may in any action or matter, at any stage of the proceedings, order the attendance of any person for the purpose of being examined or of producing to or before any examiner any writings or other documents which the court may think fit to be produced, and any person served with any such order shall be bound to attend accordingly: Provided that no person shall be compelled to produce under any such order any writing or other document which he could not be compelled to produce at the trial. [*The rule goes on to provide the method of service.*]

21. Any person wilfully disobeying any order requiring his attendance for the purpose of being examined or producing any document to or before an examiner shall be deemed guilty of contempt of court, and may be dealt with accordingly.

22. Any person required to attend before an examiner for the purpose of being examined or of producing any document shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in court.

23. [*Provides that the examiner is to be furnished with certain documents.*]

24. The examination shall take place in the presence of the parties, or their counsel or solicitors, or the agents of such solicitors, and the witnesses shall be subject to cross-examination and re-examination.

25. The depositions taken before an officer of a county court, or

before any other person appointed to take the examination, shall be taken down in writing by or in the presence of the examiner not ordinarily by question and answer, but so as to represent as nearly as may be the statements of the witness, and when completed shall be read over to the witness and signed by him in the presence of the parties, or such of them as may think fit to attend. If the witness shall refuse to sign the depositions, the examiner shall sign the same. The examiner may put down any particular question or answer if there appears to be any special reason for doing so, and may put any question to the witness as to the meaning of any answer, or as to any matter arising in the course of the examination. Any questions which are objected to shall be taken down by the examiner in the depositions, and he shall state his opinion thereon to the counsel, solicitors, or parties, and shall refer to such statement in the depositions, but he shall not have power to decide upon the materiality or relevancy of any question.

26. If any person duly summoned to attend for examination or to produce any document refuses to attend, or, if having attended, he refuses to be sworn or to answer any lawful question or to produce any document, a certificate of such refusal, signed by the examiner, shall be filed with the registrar, and thereupon the party requiring the attendance of the witness may apply to the judge for an order directing the witness to attend, or to be sworn, or to answer any question, or to produce such document, as the case may be.

27. If any witness objects to any question which may be put to him before an examiner, the question so put, and the objection of the witness thereto, shall be taken down by the examiner, and transmitted by him to the registrar to be filed, and the validity of the objection shall be decided by the judge.

28. In any case under the two last preceding rules, the judge may order the witness to pay any costs occasioned by his refusal or objection.

29. When the examination of any witness before any examiner has been concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the registrar to be filed.

30. The person taking the examination of a witness under these rules may, and if need be shall, make a special report to the court touching such examination and the conduct or absence of any witness or other person thereon; and the judge may direct such proceedings and make such order as upon the report he may think just.

31. Except where otherwise provided by this order, or directed by the judge, no deposition shall be given in evidence at the trial of the action or matter without the consent of the party against whom the same may be offered, unless the judge is satisfied that the deponent is dead, or out of England and Wales, or unable from sickness or other infirmity to attend the trial, in any of which cases the depositions certified under the hand of the examiner shall be admissible in evidence, saving all just exceptions, without proof of the signature to such certificate.

32. Any officer of the court, or other person directed to take the examination of any witness or person, may administer oaths.

33. An application for an order for a commission, request or order for the examination of witnesses out of England and Wales

shall be made to the High Court in manner prescribed by Rules of the Supreme Court.

ORDER XIX., RR. 1, 2, 4, 5, 7, 9, 10.

AFFIDAVITS.

1. All affidavits shall be expressed in the first person and shall be drawn up in paragraphs and numbered.

2. All affidavits, other than those for which forms are given in the Appendix, shall state the deponent's occupation, quality, and place of residence, and also what facts or circumstances deposed to are within the deponent's own knowledge, and his means of knowledge, and what facts or circumstances deposed to are known to or believed by him by reason of information derived from other sources than his own knowledge, and what such sources are. The costs of every affidavit which unnecessarily sets forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same.

3. [*States how affidavits are to be intituled.*]

4. It shall be stated in a note at the foot of every affidavit filed on whose behalf it is so filed, and such note shall be copied on every office or other copy furnished to a party.

5. The costs of affidavits not in conformity with the preceding rules of this order shall be disallowed on taxation, unless the court otherwise directs.

6. [*Makes provision as to the jurat where an affidavit is made by two or more deponents.*]

7. Before any affidavit is used it shall be filed in the office of the registrar, but this rule shall not hinder a judge from making an order in an urgent case upon the undertaking of the applicant to file any affidavit sworn before the making of such order, provided that such order shall not be issued until such affidavit has been filed.

8. [*Provides that an affidavit shall not be filed if sworn before the party tendering the same or his solicitor, etc.*]

9. No affidavit or other document shall be filed or used in any action or matter, unless the court otherwise orders, which is blotted so as to obliterate any word, or which is illegibly written, or so altered as to cause it to be illegible, or in the body or jurat of which there is any interlineation, alteration, or erasure, unless the person before whom the same is sworn has duly initialled such interlineation or alteration, and in the case of an erasure has re-written and signed in the margin of the affidavit or document the words or figures appearing to be written on the erasure, or which is so imperfect upon the face thereof by reason of having blanks thereon or otherwise that it cannot easily be read or understood.

10. Where an affidavit is sworn by any person who appears to the officer taking the affidavit to be illiterate or blind, the officer shall certify in the jurat that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his signature in the presence of the officer. No such affidavit shall be used in evidence in the absence of this certificate, unless the court is otherwise satisfied that the affidavit was read over to and appeared to be perfectly understood by the deponent.

INDEX.

A.

ABORTION,
evidence on a charge of procuring, 118.
corroboration necessary, 455.

ACCIDENT, 147, 395, 396, 508.

ACCOMPLICE
is a competent witness, 175.
evidence of, should be corroborated, 447, 451–453.
corroboration should go to identity of prisoner, 451, 452.
rule as to corroboration one of practice, not law, 447, 451.
statement or confession by, is not evidence against fellow-prisoner, 101, 452, 453.
acting in concert with prisoner, 65–67.

ACCORD AND SATISFACTION,
proof of plea of payment in, 605.

ACCOUNT,
when ordered by court, entries in business books are *primâ facie* evidence, 278, 376.
accuracy of, may be objected to, 278.
must be set out by executor answering interrogatories, 542.
admissions as to accuracy of, 373, 374.

ACCOUNT BOOKS,
entries in, made in course of business, 271–274, 277, 278, 376.
of deceased solicitors, 267, 277.
tradesmen, 277.

ACCUSED. *See* PRISONER.

ACKNOWLEDGMENT,
preventing period of limitation from running must be in writing and signed, 155–157, 253.
of receipt of rent, is not evidence of title, 335.
landlord's title, is evidence against subsequent tenants, 270.
conditional, of liability on bill of exchange, 372.
written, by one joint contractor, 377.
parol evidence as to contents of a lost, admissible, 310.

ACQUIESCENCE,
admission by, 83–88, 96, 97, 372, 373.
estoppel by, 405, 412–418.

ACQUIESCENCE—*continued.*
mere omission to take legal proceedings is not, 373, 374.
by not answering letters, 375.

ACQUITTAL,
proof of certificate of, 215.
bars further criminal proceedings, 398.

ACT,
continuous, 64, 93, 94.
and words forming one transaction, 61–65.
or conduct, admission by, 371–384.

ACT OF BANKRUPTCY,
evidence as to, when admissible, 64, 139–140, 206, 253, 254, 257, 350, 351.

ACT OF OWNERSHIP,
evidence as to, when admissible, 33, 106–111.
lease admissible as showing, 247, 265.
marking boundary is, 108.

ACT OF PARLIAMENT,
construction of, is for judge, 16, 473, 502, 510.
rules for construction of, 502–510.
is a public document, 211, 217.
judicial notice of, 130–133.
foreign and colonial, proof of, 132, 133.
proof of private, under Documentary Evidence Acts, 217.
private, may be presumed to support long possession, 345.
lost grant will not be presumed in contravention of, 346.

ACT OF STATE,
proof of, 212, 213.

ADMINISTRATION,
letters of, are public documents, 212, 213.
how proved, 222–224.
grant of, is not proof of death, 356.

ADMIRALTY COURTS,
judgments *in rem* by, 60, 389–391, 506.

ADMISSION, 12, 362–384.
distinguished from presumption and estoppel, 364.
dispenses with proof, 362.
is not excluded as hearsay, 263, 363, 383.
if not operating as an estoppel, may be rebutted, 364.
"without prejudice," 363.
proves any instrument, to the validity of which attestation is not requisite, 240.
formal, 364–371.
may not be made in criminal proceedings, 362.
on the pleadings, 364–366, 536.
in answer to interrogatories, 366, 532, 533.
on notice to admit facts, 367.
documents, 368, 369.
by solicitors, 369, 370.
fraudulent, 370.
counsel, 370.
informal, 371–384.
shifts burden of proof, 362, 372.

ADMISSION—*continued.*
informal, may be made in criminal proceedings, when, 380, 381.
as confession, 94–104.
binds only parties and privies, 382.
is evidence against party making it, though it relates to contents of a written document, 314, 315, 374, 383, 384.
is not evidence against party making it in another character, 363, 382.
is not admissible against another without proof of joint interest, 376, 377.
can be withdrawn, 372, 385.
by acquiescence or silence, 83–88, 372, 374.
acquiescence in inducement of, 96.
act or conduct, 371–385.
cestui que trust, 382.
co-defendants in tort, 378.
committee of lunatic, 363.
creditor as to accuracy of account, 373.
director of company, 379.
executors, 377.
guardian or next friend of infant, 380.
infant, 365, 380.
lunatic, 365, 380.
not answering letters, 375.
partner, 376, 377, 383.
payment into court, 365, 366.
predecessor in title, 376.
prisoner after caution, 99–104, 176, 371.
soliciting false evidence, 373.
wife as to adultery, 184, 199, 200, 375, 455.
between husband and wife, 380, 381.
landlord and tenant, 268–270, 374, 382.
principal and agent, 363, 369, 370, 376, 378–380.
surety, 381.

ADULTERY,
parties to proceedings in consequence of, are competent witnesses, 173, 174.
what are proceedings in consequence of, 174, 175.
questions tending to show, need not be answered, 199, 200.
evidence of, by wife in action against the husband for necessaries, 184.
admission, 199, 200.
should be corroborated, 375, 453–455.
by judgment in former action, 394, 395.

ADVICE ON EVIDENCE, 567–571.

AFFAIRS OF STATE,
questions as to, 209, 210.

AFFIDAVIT,
admissibility of, in subsequent proceedings, 374, 375.
may be made on affirmation, 510.
in answer to interrogatories, 319, 320, 366, 537, 549, 550.
of documents, 319, 320, 547–553.
primâ facie conclusive, 561.
further, 562.
inspection of documents referred to in, 547–553.

AFFIDAVIT—*continued.*
exhibits to, must be produced, 251.
by attesting witness to a will, 241.
perjury in, evidence on a charge of, 219.
copies which must be verified by, 320, 323.
evidence by, 606–608.
cannot be used at trial if party entitled to cross-examine objects, 607, 608.
when filed, cannot be withdrawn to prevent cross-examination, 607, 608.
on information and belief must state grounds thereof, 603.
on appeal, 613.
in proceedings to perpetuate testimony, 534, 535.

AFFIRMATION,
in lieu of oath, 172, 187–190, 510.
false, is punishable as perjury, 187.
affidavit on, 510.

AGE,
evidence as to, 51, 52, 142, 143, 301, 326.

AGENT,
person contracting as principal cannot show that he was an agent, 160, 161, 478.
cannot deny principal's title, 368, 411.
confession by, cannot render principal criminally liable, 101, 102.
presumption as to continuance of authority of, 355.
admission by, is evidence against principal, 363, 369, 370, 373, 378–382.
can be subpœnaed to produce his principal's documents, 591.
primâ facie evidence of authority of, is sufficient, 379, 380.
in answering interrogatories knowledge of agent is knowledge of principal, 543.
discovery of documents by agent of foreign principal suing here, 558, 564.
statement in writing by confidential, more than thirty years old, admissible, 246.

AGGRAVATION OF DAMAGES,
evidence in, 114, 567.
interrogatory in, 539.

ALMANAC,
judicial notice of, 131.

ALTERATION
in documents, 340, 341, 489, 490, 570.
of a stamped document may render fresh stamp necessary, 258.
a bill of exchange or promissory note, effect of, 258, 340, 341, 412, 489, 490.
extrinsic evidence when admissible to explain, 162, 489, 490.
in wills, 223, 340, 341, 489, 490.

AMBASSADOR
may give evidence as to the law of his country, 49.

AMBIGUITY,
latent, defined, 474, 485–487.
patent, defined, 474, 485–487.
parol evidence admissible to explain latent, 474, 486, 487, 492.
inadmissible to explain patent, 485, 492.
of meaning of document is a question for the judge, 16, 17.

AMENDMENT
of pleadings by judge, 605, 606.
by Court of Appeal, 605, 606.
of indictment by judge, 526, 527.
not after prisoner's counsel has addressed jury, 526.

ANCIENT DOCUMENTS
admissible if produced from proper custody, 150, 237, 243–248.
are evidence of transactions to which they relate, 245–248.
execution of, need not be proved, 237.
proof of handwriting of, 45, 46, 47.

ANTE LITAM MOTAM,
when statements, etc., must be, 272, 275, 276, 292, 294, 300, 303, 304, 428.

ANTIQUARY
may give expert evidence, 43.

APPEAL
to Court of Appeal, 608–615.
further evidence in, 613.
to Court of Criminal Appeal, 527–531.
fresh evidence in, 528–530.
to House of Lords, 615.
amendment on, 606.
use of judge's notes on, 528, 610.

ARBITRATOR,
when a competent witness, 90.
privilege of, 210.
power of, to summon witnesses, 576.

ARMY LIST, 299.

ARREST,
evidence in action for illegal, 276.
privilege of witness from, 579.

ARSON,
evidence on a charge of, 116, 317, 521, 594.

ART,
expert evidence as to, 43.

ASSAULT,
evidence on a charge of, 61, 62, 306.
indecent, 34.
complaints in cases of indecent, 76–82.

ASSIGNMENT
of copyright must be under seal, 154.
debentures by a company, 416.
leases must be by deed, 154.
personalty must be under seal, 154.
interrogatory as to, 542.

ATHEIST,
is now a competent witness, 172, 183–190.

ATTENDANCE OF WITNESSES, 571–581.
at coroner's inquest, 512.
in the Bankruptcy Court, 573.

ATTENDANCE OF WITNESSES—*continued.*
in the County Court, 573–574.
Court of Criminal Appeal, 530.
High Court, 571–572.
Houses of Parliament, 576.
winding-up of companies, 574, 576.
before arbitrator, 576.
from lunatic asylum, 576.
prison, 576.
without jurisdiction, 576.
service of subpœna for, 578, 579.
penalty for non-attendance, 513, 579, 580.
expenses of, 515, 580, 581, 598.

ATTESTING WITNESS
to will, evidence of, 47, 48, 239–243, 435, 466.
one must be called to obtain probate, when, 242.
more than one may have to be called, 241.
may rebut presumption as to due execution, 340.
need not be called, if attestation unnecessary, 237, 238.
document is thirty years old, 243–248.
not produced after notice, 240.
to bill of sale, 239.
private documents, less than thirty years old, as required by law, 237–243.
deed, need only see delivery, 239.
must be called on *ex parte* application in lunacy, 240.
blind, may give evidence from recollection, 243.
handwriting of deceased, may be proved, 239, 240, 241.
who refuses to make proper affidavit, may be examined in open Court, 242.

AWARD,
evidence of arbitrator as to, 90.

B.

BAILEE
is estopped from denying bailor's title, 410.
onus of proving absence of negligence on, 137, 138.

BANKER,
when bound to disclose customer's account, 209, 320.
duty of customer to, 406 *n.*, 412.
lien of, 132.
proof of entry in books of, 320–322, 569.
order to inspect books of, may be made *ex parte*, 320, 321.
may issue to Ireland or Scotland, and *vice versâ*, 321.
is discretionary, 321.
as to accounts of non-parties, 322, 569.
not to be subject to roving inspection, 322.

BANKRUPT,
examination of, 91, 197, 573.
declaration by, when admissible, 64.
domicil of, burden of proof as to, 136–137.
onus of proving absence of fraudulent intention on, 139–140, 350–351, 376, 406, 407.

BANKRUPTCY,
act of, evidence as to, when admissible, 64, 139–140, 206, 253–254, 257, 352.
admission as to, 372.
proceedings, statements on, how proved, 197.
to what extent admissible in subsequent proceedings, 91, 195–197.
proof of, 221–222.
practice as to summoning and examining witnesses, 573.
consideration for a judgment debt may always be inquired into, 393.
effect of judgment in, 391.

BAPTISM,
register of, how proved, 226–229.
is no evidence as to date of birth or identity, 226.
copies of, must be sent yearly to registrar, 227.
sealed, 227.

BASTARDY,
putative father is a competent witness, 181.
evidence of mother must be corroborated, 447, 450.
husband or wife cannot give evidence to establish, 65, 124, 175, 344.
co-respondent in former divorce proceedings can, 200.
dismissal of summons in, creates no estoppel, 399.

BIBLE,
entry in family, admissible in pedigree cases, 302.
if produced from proper custody, 245.

BIGAMY,
evidence on a charge of, 140, 182, 183, 349.

BILL OF EXCHANGE,
presumption as to date or execution of, 337.
alteration of, 258, 340–341, 412, 490.
payment arising from possession of, by drawer, 359, 360.
holder of, presumed to be for value, 143, 359–360.
burden of proof in actions upon, 143, 341, 360.
estoppel against acceptor and drawer of, 411, 412.
admission of, may estop agency being disputed, 368.
by solicitor, 369.
stamp objection to, after admission of signature, 368.
conditional acknowledgment of liability on, 372.
evidence of dishonour of, 275, 372, 595.
right to notice of dishonour of, may be waived, 372.
evidence of conviction for forging, inadmissible in subsequent proceedings, 397.

BILL OF LADING,
not excepting negligence, burden of proof where goods damaged, 137.
to what extent conclusive evidence, 360.

BILL OF SALE,
must be under seal and registered, 231.
office copies of, 231.
affidavit of execution need not be proved, 231.
attestation of, must be strictly proved, 239.
evidence in action on imperfect, 485.

BIRTH,
certificate of, 215, 227, 228.
proof of entry of, in family Bible, 245, 302.
evidence of entry of, in midwife's books to prove date of, 266.
entry of date of, in baptismal certificate, is not an entry in course of duty, 276.
declaration in pedigree case admissible to prove date, but not place of, 301.

BLASPHEMY,
corroboration on a charge of, 446 *n.*

BONÂ FIDE TRAVELLER,
burden of proof as to, 141.

BONA FIDES,
is a question for jury, 603.

BOOKS
of banker, inspection of entry in, 320–322, 569.
of recognised authority, use of, by experts, 40, 50.
judicial notice of, 130, 131.
of tradesman, 277, 312, 321, 376, 570.

BORSTAL SYSTEM, 121.

BOUNDARY,
may be viewed, 329.
presumptions as to, 358, 359.
where island in river, 358.
declarations of deceased persons as to, 294, 298.
presentment of jury as to, 298.
of foreign states, 132.
marking, is an act of ownership, 108.

BREACH OF PROMISE OF MARRIAGE,
parties to actions for, are competent witnesses, 173, 174.
evidence of plaintiff in action for, must be corroborated, 173, 174, 446–448.
corroboration, what is, 85.
defence of unchastity, 122.

BROKER,
evidence of opinion of, 38, 42.
personal liability of, may be proved by evidence of custom, 166.

BURDEN OF PROOF, 134–148.
shifted by informal admission, 362, 372.
presumption of law, 143, 331.
primâ facie proof, 145–148, 337, 422.
statute, 140–143.
lies on party stating the affirmative in substance, 134–136.
in actions on bills of exchange, etc., 143, 341, 359, 360.
for breach of covenant, 132.
in restraint of trade, 144.
for false representations, 138–139.
for infringement of patent rights, 144.
of libel, 114, 115, 122, 123, 143, 144, 148, 598.
of malicious prosecution, 138.
of negligence, 137, 138, 147.
by a bailee, 138.

BURDEN OF PROOF—*continued.*
in actions where plaintiff claims a right to light, 146.
where defendant pleads Statute of Limitations, 138.
in bankruptcy proceedings, 139–140, 350, 351, 376, 406, 407.
in criminal proceedings generally, 139–142.
on a charge of bigamy, 140.
coining, 141.
murder or manslaughter, 139.
receiving stolen goods, 139.
under the Betting Loans (Infants) Act, 1892...142.
Children Act, 1908...142.
Cruelty to Children Act, 1904...142.
Dangerous Performances Acts, 1879 and 1897...142.
Elementary Education Acts, 1870 and 1873...142.
Foreign Enlistment Act, 1870...142.
Game Act, 1831...141.
Licensing Acts, 1872 and 1874...141.
Lunacy Act, 1890...334.
Merchandise Marks Act, 1887...141.
Merchant Shipping Act, 1894...141.
Money-lenders Act, 1900...142.
Summary Jurisdiction Act, 1879...140.
as to admissibility of dying declaration, 170.
facts within a party's knowledge, 145, 146.
infancy, 143.
insanity, 185, 353.
mistake, 353, 403.
recitals in a deed, 144.
stamping of documents, 256, 257, 340.
undue influence, 144, 353.
wills, 145, 146.

BURGLARY,
evidence on a charge of, 525, 526.

BURIAL,
register of, how proved, 229.

BUSINESS BOOKS, 277, 312.
Court may order copy of entry in, 278, 322, 376, 570.

BYE-LAWS,
how proved, 213, 226.

C.

CALENDAR, 299.

CAPACITY,
parol evidence to show want of, admissible to defeat written contract, 156, 157.

CARNAL KNOWLEDGE,
evidence on a charge of, 76.
consent no defence, 76–82.

CAUTION,
statutory, 100.
questions after, by police, 103, 104.
by coroner, 287.

2 U 2

CERTIFICATE,
of acquittal, 215.
birth, 215, 228, 229.
Comptroller of Patent Office, 229.
conviction, 215, 220, 221.
coroner, 229.
death, 215, 227, 229.
marriage, 215, 227, 228, 429.
admissible in pedigree cases, 302, 303.
notary public, 219.
President of Board of Trade, 230.
proof of, 319, 320.

CERTIFIED COPY,
when admissible, 214–216, 222–229, 285.
of entry in register of baptisms or burials must be sealed, 227.

CESTUI QUE TRUST,
admission by, 382.

CHARACTER,
general evidence as to, 34, 119–124.
representation as to, must be in writing, to found action of deceit, 156.
impeaching character of witness, 34, 465–469.
not by party calling him, 433, 442, 443, 460, 461.
answer of witness as to, is generally conclusive, 467.
of witness, may be re-established by evidence of good character, 467.
calling witness as to, will not deprive prisoner of his right to the last word, 179, 520.
cross-examination of witness to, 522.
evidence in actions for seduction, 122, 198.
defamation, 122, 123.

CHARITY COMMISSIONERS,
reports of, are *primâ facie* evidence, 222.

CHARTER,
may be proved by examined or certified copy, 216.
evidence of facts referred to, 265.
evidence necessary to raise presumption of, 348.

CHILD-BEARING,
presumption as to, 356.

CHILD MURDER,
evidence on a charge of, 84, 85, 96, 111, 112, 208.

CHILDREN,
not necessarily incompetent witnesses, 186, 187.
unsworn evidence of, 187.
must be corroborated, when, 187, 447, 450.
depositions of, 287, 288.
weight of evidence of, 440.
presumption of legitimacy of, 338, 339, 343.
evidence on charges of offences against, 142, 185, 186, 187, 287, 288.
meaning of term, in will, 17, 474, 484.

CIRCUMSTANTIAL EVIDENCE, 7, 8, 423–425.

CIVIL PROCEEDINGS, 23–28, 181, 532–615.

CLERGYMEN,
communications to, are not privileged, 208.
declaration by, 269.

CODICIL,
may be shown not to be intended to operate, 162.

COGENCY, 13–18, Book III., 419–511.
distinguished from relevancy, 3, 29, 125, 419.
proof, 3, 419.
weight of evidence, 419–423.

COHABITATION,
may raise presumption of marriage, 338, 342, 343.

COINAGE OFFENCES,
evidence on charges of, 35, 93, 94, 116, 521.
burden of proof, 141.

COLLATERAL ISSUES, 106.

COLLISION, 93, 234, 466.

COLLUSION,
judgment obtained by, does not act as an estoppel, 386, 391, 400.
witness kept away by, 89, 279, 284.
suspected, may be ground for witnesses being asked to leave the court, 442, 456.
suspected, in divorce proceedings, 69, 70.

COLONIAL JUDGMENTS,
proof of, 222.

COLONIAL LAW, 48.

COLONIAL PROBATES,
proof of, 223, 224.

COMMERCIAL COURT,
rules of evidence in, 27.

COMMISSION, 582–589.
granting of, entirely in discretion of court, 586.
evidence by, when witness out of jurisdiction, 577.
when allowed, 583, 584, 585–587.
objection to evidence upon, must be taken at once, 587.
may be issued to Scotch or colonial court, 588, 589.
request to foreign court in lieu of, 585.
to ascertain foreign law, 587.

COMMON,
evidence of reputation admissible in support of rights of, 295, 297, 298, 382.

COMMON PURPOSE, 65–67.

COMMUNICATIONS
between client and legal advisers, 201–209, 248, 250, 251, 555, 556.
husband and wife, 181–185, 200–201, 248, 252.

COMPANY,
seal of, proof of, 226.
contracts by, 155, 156.
transfer of shares in, must be under seal, 154.
issue of debentures by, 416.

COMPANY—*continued.*
assignment of debentures by, 416.
"certification" issued by, 415, 416.
estoppel against, 414–416.
on share certificate, 414.
in respect of securities irregularly issued, 415, 416.
admissions by directors or agents of, when binding, 379.
winding-up of, attendance and examination of witnesses on, 574, 576.

COMPETENCY
of witness is a question for judge, 170, 181, 191.
accomplice, 175, 451, 453.
arbitrator, 90, 210.
atheist or non-believer, 172, 188–190.
counsel, 206.
deaf and dumb persons, 185.
felon, 172, 433.
husband and wife, 173–176, 183, 185, 513, 514.
idiots, lunatics, and children, 170, 185–187.
informer, 175.
judge, 90, 210.
parties to civil proceedings, 173, 174, 191.
in actions of breach of promise of marriage, 173, 174.
prosecutor and accused in criminal proceedings, 175–181.
putative father in bastardy proceedings, 181.
thief against receiver of stolen goods, 54, 55.

COMPLAINT
by prosecutrix on a charge of rape or indecent assault, etc., 76–82.
not admissible on a charge of causing grievous bodily harm, 77.

CONDUCT,
admission by, 371, 384.
estoppel by, 387, 388, 395, 404–418.
evidence of, to rebut presumption of legitimacy, 343.
to show lunacy, when admissible, 33, 115.
subsequent, when admissible, 83–91, 102, 441.
systematic course of, when admissible, 105, 106, 111–113, 116–119.

CONFESSION,
when admissible in criminal proceedings, 94–104.
need not be corroborated, 102.
inducements to obtain, 85, 95–99.
statutory caution as to, 99, 100, 176.
voluntary, made before caution, 99, 100.
when before committing magistrate, admissible, 99, 100.
by silence, 96.
of accomplice is not admissible against a fellow prisoner, 101, 452, 453.
adultery by wife should be corroborated, 184, 387, 453, 455.
principal or of agent, when admissible against the other, 101, 102.
to a medical man, 96.
third person, 97.

CONFLICT OF EVIDENCE, 439–445.

CONFLICT OF PRESUMPTIONS, 361.

CONFLICT OF STATUTES, 507–508.

CONSENT
in charges of rape, indecent assault, etc., 76–82.

CONSIDERATION,
for a written contract may be proved illegal by parol evidence, 166, 167, 500.
failure of, for a written contract may be proved by parol evidence, 167.
parol evidence of valuable, for a written contract admissible, though not disclosed in writing, 167.
effect of receipt for, in deed, under Conveyancing Act, 375.

CONSPIRACY,
evidence on a charge of, 65–67, 93, 182, 327.

CONSTRUCTION OF DOCUMENTS, 473–510.
a question for the judge, 16, 473, 474, 487, 499, 502, 510.
of ordinary words, 473, 477.
legal words, 473, 477, 478.
foreign words, 477, 479.
words with technical or local meaning, 477, 479.
two meanings, 474, 484–489.
document as a whole, 475, 487–489.
deeds, 498, 499.
grants and contracts, 499–501.
indictments, 501, 502.
statutes, 502, 510.
wills, 491–499.

CONTINUANCE OF LIFE,
presumption as to, 138, 355.

CONTINUOUS TRANSACTION,
acts and words forming one, 64, 93, 94.

CONTRACT,
meaning of, is a question for judge, 499.
particular words in, is a question for jury, 474.
by a company, 155.
corporation, 155–156.
local authority, 155.
foreign, 474, 479–480.
joint, 65, 377.
required by law to be in writing, 155–169.
under Statute of Frauds, 155.
written, agreement to waive or rescind may be implied, 162.
must be produced, 308, 309.
parol evidence as to, when admissible, 156–169, 309–311.
document lost or withheld, 309, 311, 314–320.
to annex customary incidents to, 156, 157, 165, 166, 480–483.
exclude a proved custom, not admissible, 166, 167.
explain, 158, 473, 484.
alteration in, 162, 489.
foreign and technical words in, 474, 487, 494, 500.

CONTRACT—*continued.*
written, parol evidence to explain latent, but not patent, ambiguity in, 165, 474, 475, 485–487, 492.
prove antecedent oral agreement, 158.
collateral oral agreement, 164, 165.
contract made as agent, 160, 161.
date of, 157, 167, 168.
facts not of the essence of, 167, 168.
illegality of, 157, 166, 167, 500.
invalidity of, 157, 162, 500.
liability of defendant as guarantor, 161.
mutual mistake in, 156, 157.
rescission by subsequent contract, 157, 162–164.
variation of, 32, 157–164, 168, 500.
in equity, 158, 164.
as a defence to specific performance, 163.

CONTRIBUTORY NEGLIGENCE,
burden of proving, 137, 138.

CONVERSATION
"without prejudice," 253, 254.

CONVICTION,
proof of, 215, 220, 221.
bars further criminal proceedings, 398.
previous, of witness may be proved, 34, 467, 468.
prisoner may only be proved after verdict, 4, 31, 34, 521.
cross-examination as to, when admissible, 177, 178, 180.
evidence of, not admissible in civil case, 54, 395, 397.

COPY,
certified, 214–216, 222, 223, 224–225, 227–229, 285.
examined, 214–216, 218, 222–226, 285, 309–311.
office, 214–226, 231.
probate, of will, 222–224, 312.
inspection of, 548.
duplicate, 310.
counterpart original is not, 313.
draft is not, 313.
of document, when admissible, 214–226, 249, 250, 309–311.
must show that original was in proper custody, when copy taken, 215–216.
of lost depositions, admissible, 284, 307–308.
may have to be verified by affidavit, 319–321.
supplied by opponents, 314, 319.
unstamped, may be good secondary evidence of lost document, 310.
copy of a copy, inadmissible, 313.

COPYRIGHT,
assignment of, must be under seal, 154.
evidence in action for infringement of, 169, 325.

CORONER,
duty of, in cases of homicide, 511, 512.
may administer an oath, 512.

CORONER—*continued.*
attendance of witnesses before, 512.
deposition before, admissible in subsequent proceedings, 287, 512.
certificate of, as to death, 229.

CORPORATION,
books of, how proved, 213, 225.
bye-laws of, how proved, 226.
can as a rule contract only under seal, 155.
may be bound by executed parol contract, 155.

CORROBORATION, 447–455.
when required by law, 15, 444–455.
expedient, 444, 445, 450, 451.
of plaintiff in action for breach of promise of marriage, 85, 174, 446–448.
bastardy proceedings, 447, 450.
accomplice, 54, 55, 447, 451–453.
children, 215, 216, 447, 450.
on a charge of attempting to procure abortion, 455.
blasphemy, 446 *n.*
exceeding speed limit in motor car, 447, 451.
perjury, 15, 446, 449, 450.
personation at an election, 446, 449, 450.
rape, indecent assault, etc., 76–82, 447, 450, 453, 454.
treason, 446, 448, 449.
of confession of adultery by wife, 184, 375, 453–455.
by prisoner advisable, 101.
a claim against estate of deceased person, 447, 454, 455.
may be unnecessary, where there is confession, 101.

COUNSEL,
as witness, 206.
admission by, in civil cases only, 370.
may not disclose professional communication, 201–209.
opinion of, privileged from production, 250, 251, 555, 556.
objections as to admissibility of evidence by, 459.
for prosecution, duty of, 458.
may not comment on failure of prisoner or prisoner's spouse to give evidence, 178.

COUNTERPART ORIGINALS,
are not copies, 313.
notice to produce, unnecessary, 594.

COUNTY COURT,
proceedings in, how proved, 220.
seal of, 220.
attendance of witnesses in, 573, 574.
power of judge of, to order attendance of witness from prison, 577.
depositions in, 290 *n.*
practice of, as to production and inspection of documents, 220, 329, 566.

COURT MARTIAL,
evidence in, 27, 471.

COVENANT,
burden of proof in action for breach of, 132.
in restraint of trade, 144.
does not create estoppel, 403.

CREDIT,
cross-examination to, 33, 34, 443, 465.

CRIMINAL APPEAL,
evidence in Court of, 527, 531.
attendance of witnesses in Court of, 530.

CRIMINAL CONVERSATION,
evidence in action for, 69, 70.

CRIMINAL PROCEEDINGS, 19–23, 511–531.
distinguished from civil proceedings, 181.
functions of judge and jury in, 524–527.
burden of proof in, 139, 142.
proof of substance of issue in, 502.
amendment of indictment in, 526, 527.
order of, 522–524.
right of reply in, 520, 522–524.
depositions in, 68, 280–291, 514, 515.
prisoner may give evidence for defence, 20, 176–181, 520–524.
barred by proof of previous acquittal or conviction, 398, 399.
when admissions may be made in, 362, 380, 381.
estoppels do not operate in, 388.
confessions in, 94–104.
before a coroner, 286, 287, 511–513.

CRIMINATING QUESTIONS,
need not, as a rule, be answered, 177, 178, 192–199, 287, 512, 575, 576.

CROSS-EXAMINATION,
necessity for, 22.
leading questions may be asked in, 464.
criminating questions in, need not, as a rule, be answered, 177, 178, 192–199, 287, 512, 575, 576.
irrelevant questions in, will be disallowed by judge, 465, 466, 599.
when questions as to crime or conviction may be asked in, 34, 467, 468.
to credit, 33, 34, 443, 464, 469.
questions as to former statements may be asked in, 468.
as to entries in witness's books, 123, 277.
demeanour of witness under, 438–441.
reckless, 123, 463.
may let in inadmissible document, 123, 211.
document used by witness for refreshing memory, 151–153.
upon affidavit of documents is not permitted, 562.
when there must be opportunity for, 68, 70, 88–90, 262, 264, 279, 282, 287, 288, 427, 512, 514.
of witnesses to character, 522.
witness not examined in chief, 466.
called by the judge, 466.
merely to produce a document, 571.
who has given evidence by affidavit, 606, 608.
fellow-prisoner, 101.
parties to proceedings in consequence of adultery, 199, 200.
prisoner, 116.
by police, 102–104, 444 *n.*
as to previous conviction, 177, 178, 180.
prosecutrix on charge of rape or indecent assault, 34, 441.

CROWN GRANTS,
proof of, 216.
estoppel by, 399.

CUSTODY,
proper, of ancient documents, 150, 237, 243-248.
of ancient documents, which is reasonably explained, is proper, 246.
proper, of public documents, 215, 216.
declarations as to public rights, 296.
judge decides what is proper, 244.
effect of producing a document not from proper, 444.

CUSTOM,
parol evidence of, admissible to explain, but not to contradict, a written contract, 156, 157, 165, 166, 480, 483.
explain technical terms of a written contract, 481, 482, 473, 474, 487, 494.
determine what law applies to a charter-party, 482.
prove personal liability of broker, 166.
judicial notice of, 132.
local, must be proved, 132.
cannot be proved by reference to standard histories, 299.
of trade, 58, 132, 482.
the City of London, 132.
a manor, 58, 297.

D.

DAMAGES,
when defendant may interrogate as to, 539.
evidence in aggravation of, 114, 567.

DATE
of contract, evidence to prove, 157, 167, 168.
presumptions as to, of document, 243, 337.
mistake as to, in document, may be proved by parol evidence, 243.
in indictment, not generally material, 525.

DEAF AND DUMB PERSONS
are not incompetent witnesses, 185.

DEATH,
certificate of, 215, 220, 221.
proof of entry of, in family Bible, 245.
presumption of, 355-358.
without issue, presumption of, 356.
as to date of, no presumption, 356.
register of, proof of, 229, 429.
may destroy matrimonial privilege, 200, 252.
grant of letters of administration is not proof of, 356.

DEBENTURE,
estoppel against company in respect of, 416.
assignment of, by company, 416.

DECEASED PERSON,
claim against estate of, should be corroborated, 447, 454, 455.
declaration or entry by, against interest, 265–272.
in course of business or duty, 273–278.
deposition of, at former trial when received in civil proceedings, 91, 290, 291, 304.
criminal proceedings, 68, 69, 282, 283.
declaration or entry by, as to public and general rights, admissible, 291–299.
in pedigree cases, 299–304.
entries made by, 273.

DECLARATION,
accompanying acts, when admissible, 61–67.
dying, 62, 70–76, 265, 512, 513.
by a bankrupt, 64.
clergyman, 269.
deceased vendor, 382.
partner, 376, 377, 383.
tenant, 382.
testator as to his intentions, 310, 492, 493.
trustee, 382.
not upon oath, 55.

DECLARATION AGAINST INTEREST, 265–272.
admissibility of, 265–267, 420.
contrasted with declaration in course of business, 273, 275.
status of party making, may have to be proved, 270, 271.
must be against pecuniary or proprietary interest, 266, 268–272.
risk of prosecution is not ground for admission of, 269.
may be oral or written, 265.
admissible, though declarant received facts on hearsay, 267.
need not have been made *ante litem motam*, 272.
is evidence of facts contained in it, 271.
not evidence during life of declarant, unless he be a party or a privy, 265, 267, 268.
presumption as to death of person making, 268.
by person in possession of land, is admissible to cut down interest, 269.
written: *see* ENTRY AGAINST INTEREST.

DECLARATION AS TO PUBLIC AND GENERAL RIGHTS, 291–299.
exception to rule that hearsay is not admissible, 291.
must have been made *ante litem motam*, 292–294.
may be oral or in writing, 296.
if in writing, must be produced from proper custody, 296.
must be clear and unambiguous, 296.

DECLARATION BY PATIENT AS TO SYMPTOMS, 304–306.
usually made to medical man, 41, 69, 304.

DECLARATION IN COURSE OF BUSINESS OR DUTY, 273–278.
judge decides admissibility of, 273.
contrasted with declaration against interest, 273, 274–276.
need not be made *ante litem motam*, 275, 276.
must be contemporaneous, 273–276.
confined to matters within duty of declarant, 273, 276–278.
is inadmissible, if made on hearsay, 277.

DECLARATION IN COURSE OF BUSINESS OR DUTY—*contd.*
may be oral or written, 273, 277.
is not evidence during life of declarant, 273.
written: *see* ENTRY IN COURSE OF BUSINESS OR DUTY.

DECLARATION IN PEDIGREE CASES, 299–304.
must be made by relative, 299, 300.
ante litem motam, 300, 303, 304.
meaning of "pedigree," 301.
admissible as to date, but not place, of birth, 301.
may be made on hearsay, 301, 302.
oral or in writing, 302.
consist of entries in Bibles, genealogies, etc., 302–304.

DECREE
in a possessory suit in Chancery, admissible in evidence, 60.

DEDICATION
to the public, presumption of, 345–347.

DEED,
construction of, is for the judge, 16, 499.
rules for, 487, 488, 498, 499.
when grant or transfer must be by, 154.
ancient, admissibility of, 243–248.
burden of proof as to, 144.
presumption as to alterations in, 341, 489, 490.
clauses in, 498.
date of, 337.
delivery of, 340.
execution of, 337, 339, 340.
estoppel by, 387, 402–404.
not if obtained by fraud, duress, etc., 386, 403.
effect of recitals in, 403, 499.
as to infants and married women, 404.
receipt for consideration in, under Conveyancing Act, 375.
additional consideration for, may be proved, 167.
rectification of, on ground of mistake, 164, 168.
parol evidence to vary, when admissible, 160.
secondary evidence of, admissible when original is lost or not produced, 309, 317.
attesting witness need only see delivery of, 239.
must be proved by attesting witness on *ex parte* applications in lunacy, 240.
attesting may operate as estoppel, 406.
admission of, in evidence prevents objection to erasures, etc., 368, 369.
draft of, is not a copy, 313.

DEFAMATION,
functions of jury in actions of, 603, 604.
evidence of general character in actions of, inadmissible, 122, 123.
payment into Court in actions of, 365.
proof of malice to destroy privilege, 114, 136, 148.
interrogatories in action of, 538, 545.
evidence in action of, by army officer, 235.
witness privileged from action of, 471.
See LIBEL; SLANDER.

DEPOSITIONS, 67, 68, 280–291, 514.
definition of, 67, 280.
under the Children Act, 1908, of children and young persons, 287, 288.
notice of intention to take, must have been given, 287, 288.
there must have been opportunity for cross-examination, 287, 288.
Criminal Law Amendment Act, 1861, of deceased or absent witness, 68, 286.
notice of intention to take, must have been given, 68, 286.
there must have been opportunity for cross-examination, 68, 286.
admissible for or against prisoner, 68, 285, 286.
Extradition Acts and Fugitive Offenders Act, 290, 291.
accused need not be present, 291.
under the Indictable Offences Act, 1848...281–285.
must be taken in prisoner's presence, when, 282.
there must have been full opportunity for cross-examination, 282.
must have been signed by witness and magistrate, 282, 285.
illness or insanity need not be permanent, 283.
should be rejected, when alleged illness is proved not to be serious, 283, 284.
admissible when deponent is kept out of the way by the prisoner or his friends, 281, 282, 284.
under the Merchant Shipping Act, 1894, of absent witness in both civil and criminal proceedings, 288, 289.
accused must be present, 289.
taken at a Coroner's Inquest, 286, 287, 512, 513.
prisoner probably must be present, 286, 287, 512, 513.
have opportunity for cross-examination, 286, 287, 512, 513.
in civil cases of witness since deceased or absent, 91, 290, 291, 304.
under commission or letters of request, 582–589.
in county court, 290.
in Court of Appeal, 613.
evidence on charge of perjury in, 219.
must be read over to witness and signed by him and by magistrate, 280, 281, 285, 514.
for the defence, 68, 285, 286.
may be read in subsequent proceedings, if witness dies, becomes ill or insane, etc., 68, 279, 280, 514.
no other secondary evidence can be given of what the deponent said, 308, 309.

DESIGNS,
register of, proof of, 229, 230.

DIARY
may be used for refreshing memory, 153, 273.

DICTIONARY,
admissibility of, to prove sense of words, 131.

DIRECT EVIDENCE, 7, 8, 423, 425.

DISCOVERY OF DOCUMENTS, 547–566.
referred to in pleadings, affidavits, etc., 547, 548.
believed to be in opponent's possession, 549, 550.
general, 550–552.
by affidavit, 552.
marked "private and confidential," 560.

DISCOVERY OF FACTS. *See* INTERROGATORIES.

DOCUMENT,
public, defined, 212, 213.
proof of, 211–236.
entry in, presumed to be true, 231, 232.
proper custody of, 216.
private, thirty years old, proof of, 243–248.
proper custody of, 150, 237, 243–248.
is for the judge, 244.
is evidence of transactions, to which it relates, 245–248.
less than thirty years old, proof of, 237–243.
proof of date of, by handwriting expert, 45, 46.
belonging to a corporation, proof of, 226.
parol evidence inadmissible to contradict or vary, 32, 158–165, 168, 499, 500.
admissible as to contents of, only when original is lost, withheld, etc., 308, 309, 314–323.
explain, 158, 473, 474, 479–483.
alteration in, 162, 489.
mistake in date of, 243.
usage or custom, 474, 479–483.
presumption arising from proper custody of, 246.
as to alteration in, 340, 341, 489, 490, 569, 570.
date of, 243, 337.
execution of, 237, 243, 337–342.
stamp on, when not produced, 257, 310, 319, 340–342.
stamping of, after execution or at trial, 212, 255.
sufficiency of stamp on, is for the judge, 255.
unstamped or insufficiently stamped, is inadmissible except in criminal proceedings, 255.
may be used to refresh memory, 152, 462.
evidence of account stated, 257.
act of bankruptcy, 257.
independent fact, 256, 257.
production of original, when necessary, 238, 308, 311, 570.
no notice for, need be given, 317.
by agent, 591.
though marked "private and confidential," 560.
privileged from production, 234–236, 248–254, 553–561.
copies of, when, 548, 557.
relating solely to party's own title, 553, 554.
case, 553, 554.
communications between client and legal advisers, 250, 251, 535, 536.

DOCUMENT—*continued.*
privileged from production, prepared with a view to litigation, 556, 557.
tending to criminate, 248, 251, 558.
which are the property of a third person, 558–560.
in public interest, 234–236, 249, 561.
use of, to refresh memory, 151–153.
sealing up, 535, 563.
secondary evidence of, 314–323.
affidavit of, 319, 547–552, 562.
construction of, 473–510.
is for the judge, 16, 473, 475, 487, 499.
foreign, 474–483.
of wills and deeds, 491–499.
grants and contracts, 499–501.
indictments, 501.
statutes, 502–510.
discovery of, 547–566. *See* DISCOVERY; PRODUCTION.

DOCUMENTARY EVIDENCE, 9–11, 126, 149–169, 307–323, 425–427.
contrasted with oral, 149, 150.
does not exclude oral, when, 168, 169.
requires oral evidence to explain it, 425.
no degrees of secondary, 307.
all secondary, *primâ facie* inadmissible, 308.
which must be verified by affidavit, 320–323.
Acts, 217.

DOMICIL
of origin, presumption as to, 358.
burden of proof as to bankrupt's, 136–137.

DRAFT
of deed or agreement is not a copy, 313.

DUPLICATE, 310, 314.

DURATION OF LIFE,
presumption as to, 138.

DUTY,
declaration in course of, 273.

DYING DECLARATION, 62, 70–76, 265, 512, 513.
admissibility of, is a question for judge, 71, 72.
admissible only in cases of murder and manslaughter, 70, 300, 512, 513.
death of declarant must be subject of charge, 75.
reason for admitting, in evidence, 70.
ipsissima verba should be taken down, 75.
must have been made in actual danger, 72.
hope of recovery, 72–76.
accused need not be present, 70, 512, 513.
in favour of accused is admissible, 75.
of wife against husband, 183.
person who would have been an incompetent witness, 75, 76.

E.

EJECTMENT,
evidence in action of, 247, 248, 270.

EJUSDEM GENERIS,
as a rule in construction of statutes, 507.

ELECTION PETITION,
judgment *in rem* on, 391.
witnesses entitled to certificate of indemnity, 196.

EMBEZZLEMENT,
evidence on a charge of, 35, 117, 380, 517.

ENTRY,
cross-examination as to, 123, 124, 278.
by a deceased person, evidence as to, 249, 273.
in account book, 271, 376.
banker's books, 320–322, 569, 570.
family Bible, 245, 302.
old family documents, 302, 303.
deceased midwife's books, 266.
private notebook of deceased tax collector, 268.
old parish rate book, 247.
public register, proof of, 213, 320.
rent book, 247, 312.
deceased solicitor's books, 266, 267, 276, 277.
stockbroker's day-book, 277.
surveyor's note-book, 275.
inspection of, 547.

ENTRY AGAINST INTEREST, 265–272.
admissibility of, 265, 266, 420.
admissible, though facts received on hearsay, 267.
contrasted with entry made in the course of business, 271, 273, 275.
status of party making, may have to be proved, 270, 271.
must be against pecuniary or proprietary interest, 266, 268–272.
need not have been made *ante litem motam*, 272.
is evidence of all facts which it contains, 271.
not evidence during life of declarant, unless he be a party or a privy, 265, 266, 268.
proof of handwriting of, is unnecessary after thirty years, 272.
by person in possession of land, 269.

ENTRY IN COURSE OF BUSINESS OR DUTY, 273–278.
judge decides admissibility of, 273.
is inadmissible, if made on hearsay, 277.
contrasted with entry against interest, 273–275.
is not evidence during life of declarant, 273.
may be used for refreshing memory, 273.
must be confined to matters within duty of declarant, 273, 276–278.
contemporaneous, 273–276.
need not be made *ante litem motam*, 275, 276.
oral evidence to contradict or explain, inadmissible, 277.
practice as to when taking of account ordered by Court, 288.

ESCROW, 162.

ESTOPPEL, 385–418.
definition of, 12, 385.
different kinds of, 386–387.

ESTOPPEL—*continued.*
distinguished from admissions and presumptions, 364.
has no application to criminal proceedings, 388.
binds only parties and privies, 385–389, 395, 402.
cannot be rebutted, 385.
is not a cause of action, 386, 405.
conflicting estoppels, 418.
by record, 387, 388–401.
extent of, 390.
Court must have had jurisdiction, 391, 392.
verdict without judgment creates no estoppel, 395.
res judicata, tests as to estoppel by, 395–397.
only on point actually decided, 397.
does not operate where judgment was obtained by fraud, collusion, etc., 386, 391, 400.
judgment *in rem*, 390, 391.
binds all the world, 390.
examples of, 390, 391.
judgment *in personam*, 389, 391–399.
binds only parties and privies, 388–389.
judgment by consent, 393.
against joint debtors, 394.
in civil suit is no evidence in criminal proceedings and *vice versâ*, 395–396.
where judgment roll inaccurate, 398.
conviction or acquittal bars further criminal proceedings, 398–399.
foreign judgments, 390, 391, 399–401.
by deed, 387, 402–404.
only in action based on deed, 402.
does not operate where execution of deed was obtained by fraud or duress, 386, 403.
effect of recitals in deed, 403.
must be certain, 402.
infants not bound by, 403, 404.
married women how far bound by, 404.
against a tenant, 402, 404.
by conduct (*in pais*), 387, 388, 395, 404–418.
definition of, 387, 388, 395, 404–418.
from setting up statutory defences, 407.
conduct need not necessarily be fraudulent, 407.
by holding out, 414.
misrepresentation of present fact, 408, 409.
must be certain, 408, 409.
silence or acquiescence, 405, 412–418.
against acceptor and drawer of bill of exchange, 368, 411, 412.
agent, 368, 411.
attesting witness, 406.
bailee, 410.
bankrupt, 407.
company as to its shares and debentures, 414–416.
licensee, 410.
partner, 417–418.
tenant, arising from possession, 409, 410.
payment of rent, 409, 410.
in favour of deed or will, under which party obtained possession, 413, 414.

EVIDENCE,
advice on, 567, 571.
legal meaning of term, 1, 29.
" that is not evidence," 2.
different kinds of, 7–10.
does one kind exclude another, 10, 11, 128, 168, 169.
general rules of, prevail in all Courts, 27, 28.
can be dispensed with in civil cases by consent, 27.
conflict of, 438–445.
weight of, 419–429.
of a particular fact, under Order XXX., r. 7...27, 323.
admissibility, 54.

EXAMINED COPIES,
public records may be proved by, 214–219, 222–225, 285, 309, 310.

EXECUTION
of documents, presumption as to, 237, 243, 337, 339–341.
of bills of sale, affidavit of, 231.

EXECUTOR,
admission by, is evidence against co-executors, 377.
answers to interrogatories by, 542.
judgment against, not operating as an estoppel, 396.
probate copy of will proves title of, to testator's estate, 223, 312.
de son tort, estoppel against, 409.

EXHIBIT,
to an affidavit must be produced, 251.
inspection of, 548.
in Court of Criminal Appeal, 528, 529.

EXPERIMENTS
by expert witness, evidence as to, admissible, 40, 434.

EXPERT, 39–52.
competency of, is for the judge, 39, 40.
often a partisan witness, 434. 435, 442.
to explain real evidence, 326, 354, 355.
terms in foreign language, 479.
in foreign law, 48–50.
handwriting, 44–48.
medical, 38, 40–42.
mercantile, commercial and professional, 42–43, 480.
in patent cases, 43, 44.
trade mark cases, 44.

EXTRACTS
from banker's books, 150, 312.
public registers, 150.
State records, 150.
trading company's books, 312.
tradesman's books, 277, 312.

EXTRINSIC EVIDENCE
is inadmissible to contradict or vary writing, 32, 158-166, 168, 500.
admissible to annex customary incidents to written contract, 157, 158, 165, 166, 479–483.
explain alteration in document, 162, 489, 490.
latent, but not patent ambiguity, 474, 485, 487, 492.
technical words, 473, 474, 477, 478, 500.
true meaning of document, 158, 159.

EXTRINSIVE EVIDENCE—*continued.*
is admissible to explain words in foreign language, 473, 474, 479, 480, 500.
prove collateral oral agreement, 164.
contents of written document, which is lost or withheld, 308–310, 314–320.
invalidity of written contract, 157, 166, 167, 500.
mutual mistake in a document, 157.
new contract, 157, 162–164.
testator's intention, when, 491–499.
true date of document, 157, 167, 168.
want of consideration for written contract, 167.

F.

FACTS,
showing motive, admissible, 32.
state of mind, admissible, 113–116.
system, admissible, 111–113.
evidence of particular, may be ordered by the Court, 27, 323.

FALSE IMPRISONMENT,
evidence in action of, 63, 205.
question of reasonable cause for, is for judge, 604, 605.

FALSE PRETENCES,
evidence on charge of, 112, 113, 117, 118, 328, 329, 521, 525.
right to search for goods obtained by, 516.

FALSE REPRESENTATION,
evidence in action of, 114, 138, 139.

FAMILY BIBLE,
may be produced by any member of family, 245.
entries in, admissible in pedigree cases, 302.

FATAL ACCIDENTS, 508.

FELON,
is now a competent witness, 172, 433.

FISHERY,
presumption as to legal origin of, 344, 345.
evidence of public right of, 293, 347, 348.
to prove personal prescriptive right of, 247.
in action of trespass to a several, 60, 110.
decree in former possessory suit admissible, 60.

FLAGS,
evidence of inscriptions on, 64, 327.

FOREIGN CONTRACT,
rules for construing, 473, 474, 479.

FOREIGN COURT,
request to, for examination of witnesses, 585.

FOREIGN DOCUMENTS,
official, proved by examined copy, 218.

FOREIGN JUDGMENT,
proof of, 222.
effect of, as an estoppel, 399–401.
may be impeached for fraud, 386, 391, 392, 400.

FOREIGN LAW,
is a question for jury, 602.
expert evidence as to, 48–50.
text books of, 50.
commission to ascertain, 587.

FOREIGN STATE,
depositions taken in, 290–291.
interrogatories in action by, 546, 547.
questions as to boundaries of, 132.

FORGERY,
evidence on a charge of, 116, 219, 594.
of conviction for, is inadmissible in subsequent civil proceedings, 397.
of a bill of exchange, proof of, how far an estoppel, 412.

FORMER PROCEEDINGS,
statements by third persons in, 88–91, 279, 280.
depositions taken in, 280–291.
judgments, depositions, etc., in, may be admissible as to public and general rights, 291.
admissions by counsel in, when admissible, 370, 371.
judgment in, operates as estoppel, 387–401.
in bankruptcy, statements in, how far admissible in subsequent proceedings, 91, 195–197.

FRAUD,
will not be presumed, 349, 350.
charge of, may be rebutted by proof of valuable consideration, 167.
parol evidence to show, admissible to defeat written contract, 156, 157, 166.
prevents judgment from operating as an estoppel, 386, 391.
deed from operating as an estoppel, 386.
admission by solicitor from operating, 370.
privilege as to professional communication ceases if solicitor party to any, 207.
onus on bankrupt of proving absence of, 139, 140, 350, 351, 376, 406, 407.
in formation of a company, 576.
evidence of, in action on promissory note, 267, 268.
trade mark registration obtained by, 230.

FRAUDS, STATUTE OF,
contracts under, 155, 156.
contract may be comprised in separate documents, 155.
when parol evidence is admissible to supplement contract, 487.

FRAUDULENT MISREPRESENTATION
may be proved by parol evidence, 114, 156, 157.

G.

GENEALOGY,
admissible in pedigree cases, 302–304.

GENERAL CHARACTER,
evidence as to, when admissible, 34, 119–124, 198.

GENERAL CONDUCT,
evidence as to, when admissible to show lunacy, 33.
prove illegitimacy, 343.
system, 105, 111–119.

GOODS SOLD AND DELIVERED,
evidence in action for, 56, 106, 274, 277, 354, 408, 478, 570.

GOVERNMENT DEPARTMENT,
head of, may claim privilege as to production of documents on grounds of public policy, 233–235, 249.

GRANT,
which must be by deed or in writing, 154.
ancient, is sometimes evidence of facts referred to, 245, 247, 265.
presumption of a lost, 344, 346–348.
not in contravention of an Act of Parliament, 346.
construction of, 499, 501.

GUARANTOR,
liability as, under written contract may be proved by parol evidence, 161.

GUARDIAN,
admission by, effect of, 380.

GUILTY KNOWLEDGE, 115–119, 603.

H.

HABEAS CORPUS, 518.
AD TESTIFICANDUM, 576.

HABITUAL CRIMINAL,
evidence on charge of being, 120, 121, 595.

HANDWRITING,
modes of proving, 44, 45, 126, 238.
value of, 421.
expert evidence as to, 44–48.
not necessarily by professional expert, 44.
of attesting witness, who is dead or insane, may have to be proved, 239, 242.

HEARSAY EVIDENCE, 261–306, 427.
definition of, 11, 263, 264.
general rule as to exclusion of, 11, 127, 128, 263, 264.
when rule may be dispensed with, 27.
admission is not excluded as, 263, 363, 383.
exceptions to general rule of inadmissibility of:—
declarations against interest, 265–272.
as to public and general rights, 291–299.
boundaries, 295–299.

HEARSAY EVIDENCE—*continued.*
exceptions to general rule of inadmissibility of—*continued.*
declarations as to public highways, 296–298.
right of fishery, 293.
by a patient as to his symptoms, 304–306.
in pedigree cases, 299–304.
as to inscriptions, 302, 303.
made in the course of duty, 273–278.
depositions, 280–291.
dying declarations, 61, 62, 70–76, 265.
evidence in a former proceeding, 278–280.
admissible when part of *res gestæ*, 62.
to prove act of bankruptcy, 64.
in action of malicious prosecution to show reasonable and probable cause, when, 84.
of statement by deceased admissible on a charge of manslaughter, 62.
document containing, may not be used for refreshing memory, 154.

HERALD,
communications with, are not privileged, 208.

HIGHWAY,
presumption as to dedication of, 345–347.
ownership of soil of, 359.
evidence of reputation as to, 293, 296–298.
on a charge of obstructing, 293, 399.
non-repair of, 110, 111, 177, 391, 398.
judgment *in rem* as to liability to repair, 391.

HISTORY,
admissibility of standard works of, 298.

HOLDER IN DUE COURSE,
of bill of exchange, burden of proof as to, 143, 146.

HOMICIDE,
burden of proof in, 139.
dying declarations admissible only in cases of, 62, 70–76.
presumption of malice in, 351–353.
coroner's inquest in cases of, 511, 512.
depositions taken at, 286, 287.

HOSTILE WITNESS
may be cross-examined by party calling him, 242.

HUSBAND
may give evidence against wife in criminal proceedings, when, 175–177, 181–185, 513, 514, 522.
civil proceedings, when, 173–175, 181–182.
is not compellable to disclose communications made during marriage, 181–185, 200, 201, 248, 252.
is not bound by admissions of wife, except within scope of her authority, 381.
evidence of, things said or written by, to wife admissible in action for criminal conversation, 69, 70.
to bastardise offspring, 65, 124, 175, 344.
may claim privilege as to questions about adultery, 173, 174, 199, 200.

HUSBAND—*continued.*
declaration by, as to wife's family in pedigree cases, 299, 300.
presumption as to marriage of, 338, 342.
is accountable to wife for income of her separate estate, 413.

I.

IDENTITY,
evidence of, 215.
opinion or belief as to, admissible, 51, 324–326.

IDIOT
cannot be a witness, 185, 186.

ILLEGALITY
proved by parol evidence will defeat written contract, 156, 157, 166, 167.

INCEST,
evidence as to, by prisoner's spouse, 185.

INCOMPETENT WITNESS,
idiots, lunatics and children, 170, 185–187.
husband and wife in criminal proceedings, 170, 181–185.

INDECENCY,
matters involving, questions as to, non-access, 124, 174, 210.
excluded in civil cases, 210.

INDECENT ASSAULT,
evidence on charge of, 34, 122, 441.
complaint by prosecutrix, 76–82, 441.
corroboration necessary, 447, 450, 453, 454.

INDICTMENT,
defined, 22.
construction of, 501, 502.
trial of, 518–524.
functions of judge and jury on trial of, 524–527.
substantial averments in, must be proved, 525.
amendment of, by judge, 526–527.
cannot be amended after prisoner's counsel has addressed jury, 526.
date in, not generally material, 525, 526.
evidence in Court of Criminal Appeal, 527–531.

INDUCEMENT
to confess, 85, 95–99.

INFANCY,
burden of proof as to, 143.
defence of, 407.

INFANT,
evidence to prove date of birth of, 266.
that goods are necessaries for, 603.
is not necessarily an incompetent witness, 186, 187.
bound by recitals in deed executed by guardian, 404.
admissions by guardian or next friend, 365, 380.
in pleadings, 365.
rules of Court as to discovery, apply to, 547, 551.
may give unsworn evidence, 170, 185–187.

INFERIOR COURTS,
proceedings in, how proved, 220.

INFORMER
is now a competent witness, 175.

INNOCENCE,
presumption of, 139, 348–351, 525.

INNUENDO,
evidence as to, 477.

INQUEST,
by coroner, 511–513.
depositions taken at, 286, 287.

INSANITY,
evidence of experts as to, 38.
conduct to show, 33, 115.
in former proceedings admissible in case of permanent 88.
incompetency of witness from, 185, 186.
in absence of witness owing to, deposition may be read, 281-285.
burden of proof as to, 185, 353.

INSCRIPTIONS
on flags, 64, 327.
on tombstones, walls or rings, when admissible, 302, 303, 330.

INSPECTION
of banker's books, business books, etc., 320–322, 569, 570.
buildings, rights of way, etc., 329, 330, 570, 571.
documents referred to in pleadings and affidavits, 547, 552.
not disclosed, 562.
confidential, 555, 557, 560.
in lunacy proceedings, 561.
documents privileged from, 553–561.
of mortgagee's deeds, 554.
pauper's case, 548.
will be ordered notwithstanding lien, 558.
not be ordered against third persons, 558–560, 564, 565.
to be by whom, 564.
copies of documents inspected, 563.
sealing up parts of books or documents, 563, 564.
effect of refusal to obey order for, 566.
in county courts, 329, 566.

INSURANCE,
policy of, opinion of broker as to, 38, 42.
recital in, operates as an estoppel, 403.
misrepresentation in obtaining, 69, 305.
parol evidence to vary or explain, 159.

INTENTION
is a question for jury, 603.
evidence to show, 116, 117.
presumption of, 351–353.
onus on bankrupt of proving absence of fraudulent, 139, 140, 350, 351, 376, 407.

INTEREST,
declaration against, 265–272.

INTERLINEATION
in document, 341, 489, 490, 570.
will, presumption as to, 341.

INTERROGATORIES,
practice as to, in the High Court, 536–547.
county court, 546 *n.*
bankruptcy proceedings, 573.
the winding up of a company, 574, 575.
cannot be delivered without leave, 536, 537.
security for costs must be given, 537.
to obtain admissions, 366, 532, 533.
in aggravation or mitigation of damages, 539.
for the purpose of payment into Court, 539.
must be relevant, 538, 539.
material, 541, 542.
not be "to credit," 538.
"fishing," 540.
as to contents of written documents, 540.
scandalous, 541, 543.
vexatious or oppressive, 543.
tend to criminate, 541.
seek to discover opponent's evidence or witnesses, 539, 540.
by, but not to, the Crown, 546.
not allowed in penal actions, 547.
as to assignment, 542.
professional communications, solicitor need not answer, 203, 545.
in actions of defamation, 538, 539.
for money forfeited under Patents Act, 547.
answers to, rules as to, 366, 537, 538, 544.
admissible in subsequent proceedings, 374, 375, 546.
must be by affidavit, 366, 537, 543, 549.
objections, 541, 543.
further and better, 546.
as to information and belief, 545.
by executor, 542.
infant and guardian, 547.
mortgagee, 542.
principal, on agent's knowledge, 544.
effect of refusal to answer, 566.
party may be examined *vivâ voce*, 546.

ISSUE,
defined, 23.
collateral, 105, 106.
meaning of term in will, 484.
presumption of death without, 356.

J.

JOINT CONTRACTORS, 65, 376, 377.

JOINT TORT, 65.

JOURNALS
of the Houses of Parliament, how proved, 218.

JUDGE,
duty of, in criminal cases, 23, 178, 332, 519, 520, 524, 527.
civil cases, 26, 332, 346, 383.
is not concerned with value or cogency of evidence, 524.
must say whether there is evidence for the jury, 519.
may withdraw evidence from the jury, 97, 186, 332, 600, 601.
should not non-suit without hearing evidence, 600, 602.
duty of, as to claim of non-disclosure on grounds of public policy, 233–234.
to construe documents, except in cases of libel, 16, 473, 500, 502, 510.
direct jury on all matters of law, 23, 26, 600.
exclude irrelevant evidence, 519.
stop irrelevant cross-examination, 465, 466, 599.
warn jury not to accept uncorroborated evidence, when, 450–455.
witness that criminating questions need not be answered, 194.
in actions of malicious prosecution, 604, 605.
negligence, 603.
summing up, 23, 26.
decides admissibility of evidence, 26, 601.
dying declaration, 71, 524.
confession, 97, 103.
entry made in course of duty, 273.
competency of witness, 170, 181, 191.
expert witness, 39, 40.
objection to produce a document, 233–236, 249, 252, 314.
take oath, 188–200.
questions as to originality of document, 592.
proper custody of documents, 244.
reasonableness of covenant in restraint of trade, 602.
reasonable time for service of notice to produce, 593.
secondary evidence of document, 601.
stamping of documents, 254, 259.
whether officer of company being wound up should attend as witness, 574–575.
may not decide question of existence of stamped original if denied on pleadings, 592.
a case merely upon his own inspection of real evidence, 326.
look at letters "without prejudice," when deciding questions as to costs, 253–254.
power of, to amend indictment, 526, 527.
pleadings, 605.
dispense with technical rules of evidence in civil cases, 27, 323.
order attendance of witness from prison, 577.
question witness, 470.
judicial notice of signature of, 219.
competency of, as a witness, 90, 210.
witness called by, 466.

JUDGE'S NOTES,
when admissible, 90.
use of, on appeal, 528, 530, 531, 609, 610.
judge may strike evidence wrongly admitted from, 97.

JUDGMENT,
how proved, 218–220.
foreign, 392, 399–401.
of foreign or colonial Court, how proved, 222.
English Court, how proved in foreign or colonial Court, 220.
county court, how proved, 220.
court of summary jurisdiction, effect of, 392, 393.
in bankruptcy proceedings, effect of, 391.
verdict without, is not judgment, 395.
in civil action is not evidence in criminal proceedings, and *vice versâ*, 395, 396.
estoppel by, 386–401.
in rem, binds all the world, 60, 389, 391, 506.
in personam, binds only parties and privies, 60, 389, 391.
of county court, 392, 393.
by consent, 393.
obtained by fraud or collusion is not binding, 386.
judgment roll incorrect, no estoppel, 398.

JUDICIAL NOTICE,
what is the subject of, 130–133, 219–220.
of almanacs, 131.
books of recognised authority, 131.
colonial law by Privy Council, 48 (*see* 130–133).
customs, when, 132.
documents of companies, 219.
London Gazette, 131.
maritime laws of nations, 131.
public statutes, 130–131.
royal proclamations, 131.
rules of practice, 131.
Scotch law by House of Lords, 48.
great and privy seals, 131.
seal of Central Office, 219, 220.
and signatures of commissioners for oaths, 219.
of district registry, 219.
notaries public abroad, 219.
Patent Office, 229.
Board of Trade, 230.
signature of Attorney-General, 519.
judge, 219.
status and territories of foreign sovereigns, 131.
well-known facts, 130.

JUDICIAL PROCEEDINGS,
proof of, 218, 220.

JURISDICTION,
documents out of, 318.
witnesses out of, 577, 578, 580–589.

JURY,
duty of, in criminal cases, 23, 332, 334, 524, 527.
civil cases, 26, 332, 346, 383.
where presumptions conflict, 361.
must take law from judge, 23, 26, 600.
weigh all the evidence, 419–420.
watch demeanour of witnesses under cross-examination, 438–442.
decide credibility of witness, 601.
conflict of evidence, 441–445.

JURY—*continued.*
may find verdict on evidence of one witness, 443, 447.
act on uncorroborated evidence, when, 451, 453.
stop case, when, 600.
apt to place too much weight on real evidence, 17, 426.
every indictment is tried by, 524.
construes technical phrases, 474–479.
reasonable and probable cause generally for, 603, 605.
skill and due diligence are questions for, 603.
decides whether banker reasonable or not in refusing to disclose customer's account, 322.
bona fides is a question for, 603.
express malice is a question for, 603.
foreign law is a question for, 602.
knowledge and intention are questions for, 603.
libel or no libel is a question for, 604.
function of, on a charge of bigamy, 349.
in questions of negligence, 603.
coroner's, 511–513.

K.

KING'S PRINTER'S COPY
is proof of Acts of Parliament, 214–217.

KNOWLEDGE
is a question of fact for jury, 603.
proof of guilty, 113–119.

L.

LAND,
meaning of term, before the Wills Act, 484.
interest in, how created and transferred, 154.
contract as to, must be in writing, 154, 487.
trust of, must be evidenced by writing, 154.
rectification of conveyance of, on the ground of mutual mistake, 165.
evidence in action for recovery of, 365.

LANDLORD
is estopped from alleging want of title, 410.
admission by tenant is not binding upon, 382.
admission by former tenant as to title of, 270.
tenant cannot dispute title of, 409, 410.

LARCENY,
evidence on a charge of, 85, 526.
right of search for goods stolen, 516.

LAW,
expert opinion as to foreign, 48–50.
of another part of British dominions, how proved, 132, 133.

LAW LIST, 130.

LEADING QUESTIONS, 459, 460.
may not be asked in examination-in-chief, 459.
sometimes be put by leave, 460.
be put in cross-examination, 464.

LEASE
must be by deed, when, 154.
assignment of, must be by deed, 154.
operating as an estoppel, 402, 404.
construction of, 499.
counterpart of, may be admissible, 247.
admissible as showing act of ownership, 247, 265.
proved by entries of charges in books of deceased attorney, 267.
expired, may be produced from custody of lessor or lessee, 245, 246.

LEGITIMACY,
presumption in favour of, 338, 343.
conduct of parents may rebut or support, 73, 303, 343.
recognition of, by father, 303.
evidence on issue as to, 65, 303, 304.
of access and non-access, 124, 174, 175.

LETTERS,
presumptions as to receipt of, 129, 130, 333, 334.
arising from post-mark, 338.
contracts entered into by, 155, 156.
not answering, effect of, 375.
copy of, in letter book made in course of business admissible, 274.
by one conspirator when admissible against the others, 66, 67.
prisoner admissible against himself, 100.
third persons may become admissible, 211.
be privileged, 251.
between principal and agent, 378, 379.
of mother, evidence of legitimacy of child, 65.
to Secretary of State may be privileged, 235.
to testator, how far evidence of sanity, 55.
"without prejudice," 249, 250, 252–254.
material, must be produced though marked "private and confidential," 560.

LETTERS OF ADMINISTRATION,
proof of, 213, 223.
grant of, is not proof of death, 356.

LETTERS OF REQUEST, 582–589.
to take evidence of witness who is out of jurisdiction, 577, 578.

LETTERS PATENT,
proof of, 216.
create estoppel, 399.

LIBEL,
duty of judge in actions of, 16, 352, 603, 604.
burden of proof in actions of, 114, 122, 136, 144, 148, 352, 598.
evidence as to character in actions of, 122, 123, 443 *n.*
secondary evidence as to the, when admissible, 316, 321.
interrogatories in action of, 538, 540, 544, 545.
cross-examination in actions of, 466.
payment into Court in actions of, 365.
pleas in criminal, 371.

LICENCE,
production of special, as evidence of marriage, 228.
old, admissible to prove prescriptive right of fishery, 247.

LICENSEE
cannot deny licensor's title, 410, 411.

LIEN
of banker, 132.
solicitor upon document will not avail against an order for production, 558.

LIFE,
presumption as to continuance of, 138, 355, 356.

LIGHT,
alleged right to, burden of proof as to, 146.

LIMITATIONS, STATUTE OF,
burden of proof where defendant pleads, 138.
acknowledgment preventing period of limitation running must be in writing and signed, 155, 156, 157, 253.
benefit of, when reserved to one co-contractor or co-debtor, 377.
evidence to defeat, in action on promissory note, 251.

LIS MOTA,
commencement of, 292, 294.

LOCAL CUSTOM
must be proved, 132, 299.

LONDON,
customs of the City of, how proved, 132.
legal meaning of term "City of," 478.

LONDON GAZETTE,
judicial notice of, 131.
admissible to prove bankruptcy, 221.

LOST DOCUMENT,
secondary evidence admissible as to contents of a, 309-311.
search for, must be proved, 314-316.

LOST GRANT,
presumption as to, 344, 346-348.
not in contravention of Act of Parliament, 346.

LOST WILL,
secondary evidence admissible as to contents of a, 310, 495.
presumption as to, 340.

LUNACY,
evidence of conduct to show, 33, 115.
experts as to, 38, 42.
burden of proof as to, 185, 186, 334, 353.
inspection of documents in, 561.
attesting witness must be called on *ex parte* application in, 240.

LUNATIC,
as a rule, an incompetent witness, 170, 185, 186.
attendance of, from asylum, how procured, 576.
is not bound by admissions in pleadings, 380.
by committee, 363.

M.

MAGISTRATE,
presumption as to appointment of, 337.
estoppel in favour of, 397.
depositions must be taken in presence of, 67, 281.
must sign depositions, 282, 285.
warn prisoner as to making statements, 99, 100.

MALICE
is a question for jury, 603, 604.
in cases of homicide, 139.
actions for libel, 114, 136, 148.
of witness, 439.

MALICIOUS PROSECUTION,
evidence on a charge of, 84, 138, 205, 206.
question of reasonable cause for, is for judge, 604.

MANOR,
books of, how proved, 214, 233, 234.
evidence as to customs of a, 58, 114.
presumption of a grant of the, 346.
evidence as to the waste of a, 270, 297.
to prove right of way over a, 293, 297.
hearsay evidence as to boundaries of a, 295, 297, 298.

MANORIAL RIGHTS,
evidence as to, 107–111, 293, 296.

MANSLAUGHTER,
burden of proof on a charge of, 139.
charge of, on coroner's inquest, 287.
dying declarations admissible on a charge of, 70–76.
hearsay evidence of statement by deceased admissible, 62.

MAP,
general rules as to admissibility of, 299, 330.
to prove boundaries, 296, 297.
manorial rights, 297.
road or highway, 233, 292, 293.

MARRIAGE,
proof of, 168, 226–228, 421.
entry of, in family Bible, 245.
register, 215, 227–229, 429.
declaration by deceased clergyman as to, 269.
presumption in favour of, 338, 342, 343.
a foreign, 339.
special licence as evidence of, 228.
may be solemnised in a dissenting chapel, 227.
certificate of, may be evidence in pedigree cases, 302, 303.
communications during, are privileged, 181–185, 200, 201, 248, 252.
as valuable consideration supporting written contract, 167.
contract, breach of promise of, 173, 174.

MATERIAL ACT,
words accompanying, 61–65.

MATRIMONIAL COMMUNICATIONS,
privilege as to, 181–185, 200, 201, 248, 252.

MEDICAL EXPERT, 38, 41, 42.

MEDICAL MAN,
confession to, 96.
statements to, by patients as to their symptoms, 41, 68–70, 304–306.
communications to, are not privileged, 208.
presumption against, in case of gift to, 350.

"MEDICAL REGISTER," 130.

MEMORANDUM,
use of, to refresh memory, 151–154.
must have been made shortly after the event, 151.

MERCANTILE AND COMMERCIAL EXPERT, 38, 42-44.

MISPRISION
of felony, 511.

MISREPRESENTATION,
relief against, 156, 157.
contract procured by, may be avoided, 69.
estoppel may arise from, 404, 405, 408, 409.

MISTAKE,
burden of proof as to, 353, 403.
rectification of, in conveyance, 164.
parol evidence of, as to date of document is admissible, 157, 167, 168.
to show mutual, admissible to defeat written contract, 156, 157.

MITIGATION OF DAMAGES,
evidence in, 567.
interrogatory as to, 539.

MODEL, 325, 330.

MONTH,
meaning of term, 478, 481.

MORTGAGEE,
production of title deeds by, 554.

MOTION IN ARREST OF JUDGMENT, 527.

MOTION TO QUASH, 527.

MOTIVE
of prisoner, 32, 113–119.
witness, 432, 435, 436, 438.

MOTOR CAR,
evidence on charge of driving to public danger, 133.
corroboration necessary on charge of exceeding speed limit, 447, 451.

MURDER,
burden of proof on a charge of, 139.
charge of, on coroner's inquest, 287, 512.
circumstantial evidence on a charge of, 8.

MURDER—*continued.*
confession of, when admissible, 98, 99.
dying declarations, admissible, 70–76.
of child, 84, 85, 96, 111, 112, 208.
by poisoning, what evidence admissible, 35, 41, 117.
evidence on charge of, where prisoner has already been tried for robbing deceased, 280.
hearsay evidence of statements by deceased, inadmissible, 62.

N.

NAVY LIST, 299.

NECESSARIES,
for infant, is a question for jury, 603.
evidence of wife as to her adultery in actions for, 184.

NEGLIGENCE,
burden of proof as to, 137, 138, 147, 148.
when presumed, 147, 148.
how far a question for jury, 603.
evidence on action for, 267, 408.

NEPHEW,
meaning of term in will, 484, 497.

NEW TRIAL,
grounds for moving for, 609–615.

NEWSPAPER PROPRIETORS,
Register of, 130.

NICK-NAMES
in will, 493, 496.

NIECE,
meaning of term in will, 484, 492, 497.

NON-ACCESS
can only be proved in Divorce Court, 124, 174, 210.

NON-EXPERT OPINION,
when admissible, 51, 52, 435.

NON-JUDICIAL RECORDS,
how proved, 224, 225.

NON-PAROCHIAL REGISTERS,
how proved, 228.

NON-REPAIR OF BRIDGE,
evidence on a charge of, 172.

NON-REPAIR OF HIGHWAY,
evidence on a charge of, 110, 111, 177, 391, 398.

NOTARY PUBLIC,
seal of, judicial notice of, 219.

NOTICE OF ACTION, 595.

NOTICE OF DISHONOUR,
right to, may be waived, 372.
need not be produced, 595.

NOTICE TO ADMIT FACTS,
admissions on, 367.
practice as to, in High Court, 367.

NOTICE TO INSPECT AND ADMIT DOCUMENTS, 589–596.
admissions on, 368, 369.
practice as to, in High Court, 368–369, 548.

NOTICE TO PRODUCE DOCUMENTS, 589–596.
practice as to, 314, 589–591.
must be in writing, 592.
form of, 592, 593.
may be served on party or on his solicitor, 593.
must be served within a reasonable time before trial, 314, 316, 593.
question of what is a reasonable time is for the judge, 593.
proof of service of, when essential, 590, 593, 594.
effect of refusal to obey, after service, 240, 316, 548.
need not be given by party holding duplicate or counterpart, 313, 594.
in action to recover a document, 594, 595.
if document is a notice, 595.
admittedly lost, 595.
an agreement by sailor with master of ship, 596.
original is immovable, 326–330, 595.
must be given, if document alleged to have been destroyed, 315.

NOTICE TO QUIT,
proof of service of, 276, 278.
not objected to, is evidence of commencement of tenancy, 374.
notice to produce, unnecessary, 595.

NUISANCE,
evidence on a charge of, 177, 465.

O.

OATH,
statements not on, when admissible, 70–82, 100, 264–278, 291–292, 305, 306.
affirmation in lieu of, 172, 187–189, 510.
Scotch, 190.
binding in form which deponent declares to be so, 189.
depositions must be made on, 67, 282.
coroner may administer, 512.
of secrecy, evidence in violation of, when admissible, 99.

OFFICE COPY,
when admissible, 214, 215, 218, 221, 224, 231.

OFFICIAL PUBLICATIONS, 299, 320.

OFFICIAL RECEIVER,
report of, admissible, 222.

OFFICIAL SEALS
need not be proved, 130.

OMNIA PRÆSUMUNTUR CONTRA SPOLIATOREM, 329, 353–355.

OMNIA PRÆSUMUNTUR RITE ESSE ACTA, 143, 336.

ONUS PROBANDI: *see* BURDEN OF PROOF.

OPINION
of third persons, experts, etc., evidence of, 37–52, 458.
as to indentity, 51.
condition of person or thing, 51.
of counsel privileged from production, 250, 251, 535, 536.

ORAL EVIDENCE, 8, 9, 128, 149–154, 156–169, 425–427.
contrasted with documentary, 149, 150.
when not excluded by documentary, 168, 169.
secondary (hearsay), 261–306.
different degrees of secondary, 307.
required to explain real evidence, 324, 326, 425.
documentary evidence, 425.

ORDER OF SPEECHES, ETC.,
in criminal proceedings, 522, 523.
civil proceedings, 597–600.

ORDERS OF THE COURTS,
how proved, 218–220.

ORIGIN,
presumption as to domicil of, 358.
of lawful, 344–348.

ORIGINAL DOCUMENT,
production of, when necessary, 212, 218, 238, 311.

OVERT ACT,
corroboration of evidence as to, 448.

OWNERSHIP,
evidence as to acts of, when admissible, 33, 106–111, 247, 265.

P.

PARDON,
proof of, 216.
prevents privilege as to criminating question from arising, 192, 193.

PARISH,
books of, admissible as to practice of parish, 58.
entries in parish rate books admissible, 247.
hearsay evidence as to boundaries of, admissible, 295.

PARISH REGISTERS,
proof of, 226–229.
parish clerk proper custodian of, 226.

PARLIAMENT,
Acts of, construction of, 16, 473, 502, 510.
proof of, 213, 217, 218.
Journals of Houses of, proof of, 218.
attendance of witness before Houses of, 576.

PARLIAMENTARY PAPERS,
proof of, 217.

PAROL EVIDENCE
as to lost documents, 309, 311, 314, 316.
written contract, when admissible, 156, 157, 166, 167.
See EXTRINSIC EVIDENCE.

PARTNER,
declaration or admission by one, is evidence against all, 376, 377, 383.
liability by estoppel, 417, 418.
representation of, though tortious or fraudulent, binds co-partner, 377.
interrogatories by wife of deceased, 542.
production of partnership books by, 559.

PARTY,
competency of, in civil proceedings, 173, 174, 191.
criminal proceedings, 175, 181.

PASSING OFF GOODS,
evidence in actions for, 44.

PATENT,
registers of, proof of, 229, 230.
action for infringement of, evidence in, 398.
by experts, 43, 564.
burden of proof in, 144.
money forfeited under Patent Act, interrogatories in, 542.
construction of specification of, is a question for judge, 44.
infringement of, is a question for judge, 44.
estoppel of licensee of, 410, 411.

PATENT OFFICE,
seal of, is judicially noticed, 229.

PATERNITY,
name of father in register of births is no evidence of, 276.

PATIENT,
statement by, as to symptoms to medical man, 41, 42, 68–70, 304–306.

PAUPER,
evidence of settlement of, 247, 248, 269, 373.
order adjudicating on settlement of, is a judgment *in rem*, 391.
case laid by, before counsel, cannot be inspected, 548.

PAYMENT,
proof of, 126, 377, 380, 605.
effect of, by one joint contractor, 377.

PAYMENT INTO COURT,
effect of, as an admission, 365, 366.
estoppel, 393, 394.
interrogatories for purpose of, 539.

PEDIGREE,
definition of, 301.
hearsay evidence of, 299–304.
declarations as to, 299–304.
must be made *ante litem motam*, 300, 303, 304.
by a relative, 299, 300.
admissible as to date, but not place, of birth, 301.
evidence of up-bringing in cases of, 303.
entries in public documents as to, 227, 228.
certificate of marriage admissible to prove, 302.

PENALTY,
evidence in action for a, 181, 192, 198, 235, 547.

PERJURY,
evidence on a charge of, 90, 187, 219, 336, 594.
corroboration necessary as to falsity of statement sworn to, 15, 446, 449, 450.
what may be, 433.
charge of, by order of judge, 518.

PERPETUATE TESTIMONY,
depositions taken to, 68, 285.
affidavits to, 534, 535.

"PERSON IN AUTHORITY," 95–98, 102–104.

PERSONATION,
corroboration necessary on a charge of, 446, 447, 449, 450.

PHOTOGRAPH,
when admissible, 312, 325, 563.

PLAN, 325, 330.

PLEADINGS,
admissions on, 364, 366, 536.
amendment of, rules as to, 605.
documents referred to in, must be produced, 251, 547, 548.

POISONING,
evidence in charge of, 35, 42, 116, 305, 306.

POLICEMAN,
statements to, or in the presence of, when admissible, 95–98.
duty not to interrogate accused, 102–104, 444.
power of, to search, 20, 21, 516–518.

POSSESSION
of goods recently stolen, 139, 335, 336.

POSTING A LETTER,
proof of, 129, 130, 333.

POST-MARK,
proof of, presumption arising from, 338.

PREAMBLE
of statute, may be used in construing, 504.

PREDECESSORS IN TITLE,
evidence in former action between, 279.
admissions by, 376.
estoppel by judgment between, 388–389.

PRESCRIPTIVE RIGHTS,
proof of, 295, 296.

PRESUMPTION, 331–361.
defined, 331–333.
distinguished from admissions and estoppels, 364.
primâ facie proof, 333–336.
different kinds of, 11, 12, 332.
of fact is a mere argument, 332.
law, irrebuttable, is no presumption, 332.
conflicting, 361.
shifts burden of proof, 143, 331.
of continuance of existing state of things, 355–361, 383.
innocence, 139, 348–351, 525.
intention, 351–353.
of natural consequence of act, 351–353.
lawful origin, 344–348.
regularity, 336-344.
in favour of marriage and legitimacy, 338, 339, 343.
against a wrong-doer, 329, 353-355.
bankrupt, of intent to defraud creditors, 139, 140, 350, 351, 376, 407.
those having influence over others, 144, 350.
trustees for sale, 350.
as to alterations in deeds, wills, and bills of exchange, 258, 341, 412, 490.
appeal, 342.
authority of solicitors, 369.
bills of exchange, 143, 337, 359.
lading, 360.
bond given during cohabitation, 361.
boundaries, 358, 359.
child-bearing, 357.
clauses in a deed or will, 498.
dates of documents, 243, 337.
domicil of origin, 357.
due appointment of public official, 272.
execution of deeds and wills, 243, 337, 339, 340.
full age of contracting party, 143.
lost wills, 340.
persons acting in a public capacity, 144, 337.
property in bed of stream, 358.
soil of highway, 358, 359.
receipt of letters posted, 129, 130, 333, 334.
sanity, 185, 351.
stamping of documents not produced, 257, 310, 319, 340-342.
arising from long enjoyment of property, 344-348.
possession of goods recently stolen, 117, 139, 335, 336,
proper custody of document, 246.
receipts for rent, 334, 335, 409, 410.
in actions for libel, 143, 352.

PRESUMPTION—*continued.*
in charges of bigamy, 140, 349.
sending betting circulars to infants, 142.
of death, 353–358.
as to date of, none, 356, 360, 361.
without issue, 356.
of declarant against interest, 268.
fraud, none, 349, 350.
life, 138, 355.
a lost grant or dedication, 344, 346–348.
negligence (*res ipsa loquitur*), 147, 148.
ownership arising from possession of land, 269, 340.
survivorship, 357.
refusal to produce documents on notice raises no presumption as to contents, 355.
claim of privilege raises no adverse presumption, 355.
as to ademption, advancement and satisfaction, none, 361.

PRESUMPTIVE EVIDENCE: *see* PRIMÂ FACIE PROOF.

PREVIOUS CONVICTION
of witness, 34, 467, 468.
prisoner, evidence of, only admissible after verdict, 4, 31, 34, 521.
cross-examination as to, when admissible, 177, 180.

PRIEST
not compelled to disclose communication, 208.

PRIMÂ FACIE PROOF
distinguished from presumption, 333–336.
shifts burden of proof, how far, 145–148, 337, 422.
as to age, 142.
negligence, 147.
posting a letter, 129, 130, 333, 334.
of agency, 380.
service of notice to produce, 593, 594.
receipt for rent is, of former payments, 335.
when account is ordered to be taken by Court, 278.
"Law List," 130.
"Medical Register," 130.
"Register of Newspaper Proprietors," 130.

PRIMARY EVIDENCE, 9, 10, 18, 128, 215, 308, 312, 313, 427–429.

PRINCIPAL,
admission by agent is evidence against, 363, 369, 370, 376, 378–380.
confession by agent is not evidence against, in criminal cases, 101, 102.
person contracting as, cannot show that he was an agent, 160, 161, 478.
admission by, not evidence against surety, 355.
must use agent's knowledge in answering interrogatories, 543.
when non-repudiation of agent's unauthorised act binds, 373.
agent cannot deny title of, 368, 411.

PRISONER,
evidence of previous conviction of, can only be given after verdict, 4, 31, 34, 521.
statement by, admissible against him, 99–104, 176, 371, 444 *n.*, 519.
must be cautioned as to, 99, 176, 371.

PRISONER—*continued.*
confession by, 20, 94–104.
is a competent witness for defence, 20, 177–181, 520, 522.
cross-examination of, as to previous convictions, 177, 179–181.
evidence against, by wife, 184, 185, 522.
Poor Prisoners' Defence Act, 1903...179, 514.
must be present when depositions taken at a coroner's inquest, 287.
under the Indictable Offences Act, 1848...382.
Merchant Shipping Act, 1894...289.
represented when depositions taken under the Criminal Law Amendment Act, 1867...68.
taken under the Children Act, 1908...287, 288.
need not be present when depositions taken under the Extradition Act and Fugitive Offenders' Act, 291.

PRIVATE DOCUMENTS,
less than thirty years old, requiring attestation, proof of, 239–243.
not requiring attestation, 237–239.
thirty years old, proof of, 243–248.
presumption as to date of, 243.
proof of proper custody of, 243–248.
may have to be stamped, 238.
presumption as to execution of, 336.
marked "private and confidential" may have to be produced, 560.

PRIVIES,
different kinds of, 382.
to a conspiracy, evidence as to, 65–67.
parties to a former action, 88–91, 279, 280.
declarations of living, admissible, 268.
admissions bind, 382.
estoppels bind, 385–387, 395, 402.

PRIVILEGE
cannot be claimed, until witness is sworn, 193.
may be waived, 195, 203.
may cease, when reason for it ceases, 199.
"once privileged, always privileged," 203, 235, 250, 556.
claim of, creates no unfavourable presumption, 355.
of arbitrator, 210.
witness as to criminating questions, 177, 178, 192–199.
documents, 248, 558.
degrading questions, 198.
on grounds of public policy, 191, 209, 210.
documents on grounds of public policy, 234, 236, 249, 561.
no secondary evidence admissible as to contents of documents thus privileged, 249, 250, 316–319.
of documents from production, 248–252, 553–561. *See* PRODUCTION.
copies of documents, 548, 556.
matrimonial communications, 181–185, 200, 201, 248, 252.
wife need not criminate husband, 194.
questions tending to show adultery, 199, 200.
professional communications, 201–209, 248, 250, 251, 555, 556.
documents laid or intended to be laid before solicitors, 250, 251.

PRIVILEGE—*continued.*
of professional communications—*continued.*
evidence obtained for litigation, 202.
made without reference to litigation, 201, 202.
to solicitor acting for co-adventurer, 205.
letters, 205, 235.
is client's, not solicitor's, 203.
opinions of foreign lawyers, 250, 251.
does not exist, where solicitor is party to a fraud, 207.
extend to communications for an illegal purpose, 207, 208.
clergymen, patent agents, medical men, bankers, heralds, etc., 208, 209.
under the Bankruptcy Acts, 195–197.
Corrupt Practices Act, 196.
Criminal Evidence Act, 196.
Explosive Substances Act, 196.
Larceny Act, 195.
of witness from action of defamation, 471, 472.
arrest, 579.
in actions of defamation may be rebutted by proof of malice, 114, 115, 136, 148, 603, 604.

PRIVY COUNCIL
takes judicial notice of colonial law, 48 (*see* 132, 133).
member of, may not disclose proceedings, 210.

PROBATE
copy of a will, how proved, 213, 222–224, 312.
one of the attesting witnesses must be called to obtain, 242.
of lost will, evidence to obtain, 310.
records judgment of Court as to due execution of will, 312.
establishes executor's title to administer deceased's estate, 223, 312.

PROCEDURE,
criminal, 19–23, 511–531.
civil, 23–28, 532–615.

PROCLAMATIONS,
royal, proof of, 213, 217, 218.
other than royal, proof of, 217, 218.

PRODUCTION OF DOCUMENTS, 547–566.
mentioned in pleadings and affidavits, 546–549.
by affidavit of documents, 549–552.
further affidavit, 562.
believed to be in opponent's possession, 549, 550.
subpœna duces tecum for the, 571, 572.
by stranger to action, 565, 566.
when document is in joint possession with stranger to action, 559.
between co-defendants, 550, 557.
by defendant though in contempt, 551.
mortgagee, of his deeds, 554.
of document marked "private and confidential," 560.
sealing up parts of books or documents, 563.
effect of refusal to obey order for, 566.
in county courts, 566.
lunacy, 561.
Court of Criminal Appeal, 527, 528.

PRODUCTION OF DOCUMENTS—*continued.*
privilege from, where document relates solely to holder's title, 553, 554.
case, 553, 554.
prepared with a view to litigation, 556, 557.
tends to criminate, 248, 251, 558.
is in possession of a third party, 558–560.
production would be against public interest, 234–236, 249, 561.
of document passing between client and legal adviser, 535, 536.
judge may inspect document for which privilege is claimed, 555, 572.
And see NOTICE TO PRODUCE.

PROFESSIONAL COMMUNICATIONS, 201–209, 248–251, 355, 545.

PROFESSIONAL MEN
as experts, 42–44.

PROMISE
to induce a confession, 95–100, 103.

PROMISSORY NOTE,
presumption as to date or execution of, 337.
alteration of, 258, 340, 341, 412, 489, 490.
admission by joint maker, effect of, 271.
must be properly stamped, 257, 258 (*but see* 462 *n.*).
evidence in action on a, to avoid, Statute of Limitations, 251.
prove fraud, 267, 268.
presentment of, abroad, how proved, 49.

PROOF, 6–13, Book II., 125–418.
distinguished from Relevancy, 3, 29, 125.
Cogency, 3, 419.
burden of, 73, 134–148.
degree of in civil and criminal cases, 422, 423.

PROPER CUSTODY
is a question for judge, 244.
what is proper custody, 215, 216, 226.
no strict rule as to what is, 244.
is custody, which can be reasonably explained, 244.
ancient documents admissible, if produced from, 150, 237, 243–248.
copy of public document must show that original is in proper custody, 215.
of declarations as to public rights, 296, 297.
effect of producing document not from, 444.

PUBLIC ACTS OF PARLIAMENT,
judicial notice of, 130, 131, 212, 213, 217.
construction of, 502–510.

PUBLIC DOCUMENTS,
defined, 211.
proof of, 211–236.
entries in, when admissible as evidence of facts referred to, 232, 233.
parliamentary papers, 217, 218.

PUBLIC DOCUMENTS—*continued.*
public judicial, proof of, 218–224.
non-judicial, proof of, 224–225.
proper custody of, 215, 216.
privileged from production, 233–235.
letters of administration are, 212, 213.

PUBLIC EXAMINATION,
of bankrupt, 195–197, 573.
in winding up of company, 574–576.

PUBLIC FISHERY,
evidence of right of, in tidal river, 60.

PUBLIC HOLIDAYS,
judicial notice of, 131.

PUBLIC INTEREST,
privilege of witnesses on grounds of, 191, 192, 209, 210.
affairs of state, 210.
matters involving indecency, 124, 210.
parliamentary and judicial proceedings, 210.
documents on grounds of, 234–236, 249, 561.
claimed by head of department, not a question for judge, 233, 234, 249, 561.
contents of documents thus privileged may not be proved by copy or other secondary evidence, 249, 250, 310, 311.
declaration as to, must be made *ante litem motam*, 292, 294.

PUBLIC RECORDS,
are evidence of their own authenticity, 231–233.
may be proved by examined copies, 214, 216, 218, 222.

PUBLIC REGISTERS,
proof of entries in, 213, 226–233, 320.
of bills of sale, etc., 231.
births, marriages, and deaths, 226–229.
patents and designs, 229, 230.
shipping registers, etc., 231.
trade marks, 230, 231.

PUBLIC SERVANTS,
presumptions as to acts of, 144, 337.
due appointment of, 272.

PUNCTUATION,
disregarded in wills, 497.

Q.

QUARTER DAYS, 478.

QUO ANIMO, 113–119.

R.

RAPE,
evidence on a charge of, 34, 122, 180, 183, 441.
complaint by prosecutrix, when admissible, 76–82, 441.
cross-examination of prosecutrix, 198.
corroboration necessary, 447, 450, 453, 454.

REAL EVIDENCE, 8, 9, 188, 324, 333, 425–427.
defined, 149, 324.
weight of, 17, 426.
oral evidence required to explain, 324, 326, 425.
expert witness may be required to explain, 326, 354.
production of, not compulsory, 327–330, 427.
right to view where production of, impossible, 329.
jury apt to place too much weight on, 17, 426.

REASONABLENESS,
when a question for judge, and when for jury, 322, 603, 604, 605.

REBUTTING EVIDENCE
in criminal cases, 119.
civil cases, 567.

RECEIPT
is *primâ facie* evidence of payment, 168, 271, 376.
for rent, presumption of former payments from, 334, 335, 410.
is not evidence of title, 334, 335.
consideration in deed, effect of, under Conveyancing Act, 375.
as a declaration against interest, 266–268.
unsigned, may be admissible, 272.
unstamped, may be used for refreshing memory, 151, 152.
evidence of a collateral fact, 257.

RECEIVING STOLEN GOODS,
evidence on a charge of, 35, 54, 85, 101, 117, 139, 335, 336, 380.
notice to prisoner of intention to prove previous conviction, 117.
right to search for goods, 516, 517.

RECITAL,
effect of, as an estoppel, 403.
to infants and married women, 404.
rules as to construing, 487, 488.
burden of proof as to, 144.

RECOGNIZANCE,
operates as an estoppel, 399.

RECORD,
estoppel by, 387, 388–401.
of Supreme Court, proof of, 218, 219.
non-judicial, proof of, 224, 225.

RECOVERY
of land, evidence in action for, 365.
interrogatories in action for, 541, 542.

RE-EXAMINATION, 469–472.
leading questions not allowed in, 469.
questions asked in, must arise out of cross-examination, 469, 470.

REFRESHING MEMORY, 16, 151–153, 211, 462.
expert on foreign law may use treatise for, 50.
from inadmissible document, 151, 426, 462.
diary may be used for, 151, 152, 273.
entries in course of business may be used for, 273.
but not copies of, 462.

REGISTER,
proof of entries in a public, 213, 226–229, 320.
of baptisms and burials, proof of, 226–229.
bills of sale, proof of, 231.
births, marriages, and deaths, proof of, 227–229, 429.
municipal and parliamentary electors, proof of, 216.
Newspaper Proprietors, proof of, 130.
patents, designs, and trade marks, proof of, 229, 230.
shipping, proof of, 231.
medical, proof of, 130.
non-parochial, proof of, 228.
parish, proof of, 226–229.
who is proper custodian of, 226.

RELEVANCY, 1–6, Book I., 29, 124.
distinguished from cogency, 3, 29, 125, 419.
proof, 3, 29, 125.

RENT,
receipt for, raises presumption of former payments, 334, 335, 410.
revival of, is not evidence of title, 335.

REPLY,
right of, in criminal proceedings, 520–524.
civil proceedings, 599, 600.

REPORT,
of official receiver, admissible, 222.

REPRESENTATION,
as to third person's character or position, 156.
false, evidence in action of, 114, 138, 139.
tortious or fraudulent, of a partner binds co-partners, 376, 377.

REPUTATION,
as evidence of marriage, 343.
declaration as to matter of, in support of public right, 295, 297, 298, 382.
prescriptive right, 295.
declaration as to matter of, as to public right of fishery, 293.
must be made *ante litem motam*, 292, 294.

RES GESTÆ, 61–82, 92, 304–306.

RES INTER ALIOS ACTA, 56, 57.

RES JUDICATA, 388, 389, 392, 395.

RESTRAINT OF TRADE,
burden of proof as to covenant in, 144.

REVERSIONER,
declaration by deceased tenant is not evidence against, 269, 270.

RIGHT OF WAY
may be viewed, 329.

ROBBERY,
right of search for goods in cases of, 516.

ROYAL COMMISSIONS,
proof of papers belonging to or issued by, 213.

ROYAL PROCLAMATIONS,
proof of, 213, 217, 218.
judicial notice of, 131.

S.

SANCTION
of truth, 427, 430, 431, 457.

SANITY,
evidence as to, 38, 42, 55.
presumption as to, 185, 351.

SCIENTIFIC EXPERT,
evidence of, 39, 458.
is not usually asked to leave Court with other witnesses, 456.
order for inspection by, in patent actions, 564.

SCOTCH LAW,
judicial notice taken of, in House of Lords, 48.

SEAL,
when assignments must be under, 154.
contract must be under, 155, 156.
grant or transfer must be under, 154.
may be necessary on certified copy of document, 214, 226, 227.
judicial notice of great and privy seals, 131.
seal of Apothecaries Company, 226.
Board of Trade, 230.
Central Office, 219, 220.
commissioners for oaths, 219.
Corporation of London, 226.
district registries, 219.
notary public in British possessions abroad, 219.
Patent Office, 229.
of foreign notary, not judicially noticed, 219.
company on its bye-laws, 225, 226.
must be proved genuine, 225, 226.
county court, 220.

SEARCH,
for lost document, 314–316.
power of police to, 20, 21, 516–518.

SEARCH WARRANT, 516.

SECONDARY EVIDENCE,
definition of, 9, 18, 128, 261.
generally inadmissible, 10, 261, 263, 310, 427–429.
of document lost or destroyed, admissible, 311, 314–316.
not produced after notice, 314, 316–319.
in possession of third person, 318,
not properly stamped, 256; *see* 341, 342.
unless stamp can be presumed, 310.
where privilege from production claimed, 316.
becomes inadmissible whenever original is produced, 592.
by admissions, admissible, 314, 374, 384.

SECONDARY EVIDENCE—*continued.*
no degree in secondary documentary evidence, 308.
of lost will, 310.
inscription, 302, 303.
inadmissible to prove anything privileged on grounds of public policy, 210, 249–250.
contents of public document thus privileged, 233, 234.
oral, 261–306; *see* HEARSAY.

SECRETARY OF COMPANY,
estoppel by act of, 415, 416.
production of documents of company by, 560, 572.

SECRETARY OF STATE,
proof of official documents signed by, 216.
no power to issue general search warrant, 516.
power of, to order attendance of witness from prison, 577.
letter to, privileged from production, 235.

SEDUCTION,
evidence in actions for, 122, 198.

SHARES,
estoppel in respect of share certificates, 414–417.
transfer of, proof of, 154.

SHIPPING REGISTERS,
proof of, 231.

SHORTHAND NOTE,
use of, in evidence, 88, 308, 575, 610.
in all criminal trials, 439 *n.*, 528, 530, 531.

SILENCE
as an estoppel, 405, 412–418, 478.
admission of guilt, 83–88, 96, 372, 374, 382, 452.

SIMILAR FACTS,
evidence of, 41, 55–59, 60, 105–119.

SLANDER,
evidence in action of, 93, 114, 115, 136, 235, 477, 598, 605.
evidence of innuendo in, 477.
as to character in actions for, 122, 123.
interrogatories in actions of, 538, 545.
payment into court in actions of, 365.
privilege of witness against action for, 471.

SOLICITOR,
admission by, 202, 369, 370.
fraudulent, does not bind client, 370.
agent on behalf of, 370.
not in criminal proceedings, 371.
presumption as to authority of, 369.
against, in case of gift to, 350.
entry in books of deceased, 266, 267, 277.
unwritten retainer of, must be corroborated, 455.
cannot be asked to leave Court as witness can, 456.
books of, not producible by client, 558.
lien of, will not avail against an order for production, 558.

SOLICITOR—*continued.*
may not disclose professional communications, 201–209, 250, 251, 355, 555, 556.
information and documents obtained by, when privileged, 202, 556, 557.
letters to, when privileged, 205, 250, 251.
copies of documents obtained by, 556.
waiver of privilege by client, but not by solicitor, 203.
participation of, in fraud or illegality excludes privilege, 207, 208, 555, 556.
must disclose client's name, but not his address, 203.

SPECIAL LICENCE,
as evidence of marriage, 228, 229.

SPEECHES,
order of, in criminal proceedings, 522, 524,
civil proceedings, 597–600.

STAMP,
on documents generally, 212, 225.
certified copy of document, 215, 235.
may be necessary on private documents, 238, 368.
necessity for, and sufficiency of, are questions for judge, 255.
ruling of judge as to, no ground for new trial, 254, 259.
secondary evidence of unstamped document inadmissible, 255, 256 (*but see* 342).
presumption as to, on document not produced, 257, 310, 319, 340–342.
document inadmissible for want of, may be used to refresh memory, 151, 462.
evidence of independent fact, 257.
alteration of stamped document may render fresh stamp necessary, 258, 340, 341, 412.
stamp objections, 254–260, 368.
cannot be waived, 257, 369.
time for, 259.
should be taken by officer of Court, 255.
may be met by payment of penalty, 212, 254.
sometimes fatal, 255.
absence or defect of, will not exclude document in criminal proceedings, 255.

STATE DOCUMENTS,
production of, contrary to public interest, 233–236, 249, 316.

STATE OF MIND,
evidence to show, 34, 105, 113–116.

STATEMENTS,
by accomplices, 101, 452, 453.
conspirators, 65, 66.
patients to medical men as to symptoms, 41, 42, 68–70.
persons since deceased, 70–76.
prisoner, 99–104.
prosecutrix in charge of rape, etc., 76–82.
third persons, 61–82.
in former proceedings, 88–91.
not on oath, when admissible, 70–82.

STATUTES,
construction of, is for judge, 16, 473.
rules for construction of, 502, 510.
judicial notice of, public, 130, 131.
of England and Great Britain, proof of, 217.
colonial, proof of, 218.
shift burden of proof, 140-143.
conflict of, 507, 508.

STOLEN PROPERTY,
recent possession of, 139.

SUBPŒNA,
ad testificandum, 25, 512, 515, 571, *et seq.*
duces tecum, 25, 249, 318, 512, 518, 571, *et seq.*
may be issued without leave of Court, but not oppressively, 571, 572.
service of, 578, 579.
not *bonâ fide*, may be set aside, 515.
penalty for disobedience of, 513, 579, 580.
by coroner, 512.
prisoner, 515.

SUBSEQUENT CONDUCT,
of prisoner, evidence as to, 102, 441.
witness, when material, 441.

SUBSEQUENT PROCEEDINGS,
admissions by counsel in former proceedings, when admissible in, 370, 371.
estoppel by record in, 387, 388-401.
answers to interrogatories in former proceedings, admissible in, 374, 375, 546.
when depositions may be used in, 281-291.
statements by third persons given in former proceedings may be evidence in, 88-96.
answer of witness, who claims privilege and is overruled in former proceedings, is not evidence in, 193.

SURETY,
admission by principal is not evidence against, 381.

SURROUNDING CIRCUMSTANCES,
evidence of, when admissible, 93, 94, 343, 477, 492, 494.
as a test of witness's veracity, 439, 441-445.

SURVIVORSHIP,
presumption as to, 357.

SYMPTOMS,
statements as to, by patient to medical man, 41, 68-70, 304-306.

SYSTEMATIC COURSE OF CONDUCT,
evidence as to, 105, 106, 111-113, 116-119.

T.

TECHNICAL TERMS,
construction of legal, in documents by judge, 473, 477, 478.
local, in documents by jury, 477.
of trade, 477, 479.

TECHNICAL TERMS—*continued.*
may be explained by parol evidence, 473, 477, 478, 500.
use of dictionary to explain, 131.

TEMPORAL ADVANTAGE,
what are promises of, 95, 97–99.

TENANT,
admission by, is not binding on landlord, 374, 382.
of landlord's title by deceased tenant is evidence against subsequent tenants, 270.
lease by, operating as an estoppel, 402, 404.
cannot derogate from landlord's title, 382.
dispute landlord's title, 409, 410.

TENDER,
proof of plea of, 605.

TESTATOR,
presumption as to destruction of will by, 340.
declaration by, when admissible, 310, 492, 493.
use of nicknames by, 493, 496.
evidence of intention of, when admissible, 491–498.

TESTIMONY,
perpetuation of, 68, 285, 534, 535.

TEXT BOOKS,
may be used to refresh memory of expert witness, 40, 50.

THIRD PERSONS,
what they did, when admissible, 53–60, 83–91.
said, when admissible, 61–82, 123, 279, 280.
think, when admissible, 37–52.
confessions to, 92–104.
letters by, 211.
to a solicitor may be privileged, 251.
may give evidence of overheard communications between husband and wife, 201.
be subpœnaed to produce documents, 249.
produce documents improperly given them by a solicitor, 251.
statements by, are generally inadmissible as hearsay, 263, 264.
declarations made in course of duty are evidence against, 273.
as to acts done by, are inadmissible, 277.
fraud by, will not be presumed, 349.
admission by party may defeat claim of, 382.
questions as to transactions with, usually disallowed in cross-examination, 465, 466.
privilege of documents in possession of, from production, 249–251, 558–560, 565.
secondary evidence of document in possession of, when admissible, 319.

THREAT,
to induce confession, 95–100, 103.

TIME,
if of the essence of the offence, must be strictly proved, 525.

TOMBSTONE,
evidence of inscription on, when admissible, 302, 303, 330.

TRADE,
covenant in restraint of, 144.
customs of, 57, 58, 132, 481–483.

TRADE MARK,
evidence in actions for infringement of, 46.
proof of, by register, 229, 230.

TRADESMAN'S BOOKS, 277, 312, 322, 376, 570.

TRADING COMPANIES, 155.

TRANSACTION,
act and words forming one, 61–65.
continuous, 64, 93, 94.

TRANSFERS,
which must be by deed or in writing, 154.

TREASON,
corroboration necessary on a charge of, 446, 448, 449.
whether wife can give evidence against her husband in, doubtful, 183.
cross-examination on a charge of, 209.
conspiracy to commit, 66.

TRESPASS,
evidence in action for, 59, 60, 66, 295, 347, 348, 399.

TRIAL,
of an indictment, 518–524.
functions of judge and jury on, 524–527.
evidence in Court of Criminal Appeal on, 527–531.
order of speeches on, 522, 524.
of a civil action, 597–615.
functions of judge and jury, 600–606.
evidence in Court of Appeal, 608–615.
order of speeches on, 598–600.

TRUST,
assignment of any, must be in writing, 154.

TRUSTEE,
admission or declaration by, 382.
receipt by, is evidence against co-trustee, 377.
for sale, presumption against, 350.

U.

ULTRA VIRES,
admissions by directors which are, 379.
actions by public bodies which are, raise no estoppel, 393.

UNDUE INFLUENCE,
burden of proof as to, 144, 353.
charge of, may be rebutted by proof of valuable consideration, 167.

UNSTAMPED DOCUMENT,
admissions as to contents of, 384.
oral evidence admissible as to contents of, 309, 310.
admissible on payment of penalty, 212, 295.
may be used for refreshing memory, 151, 152, 462.

UNSWORN EVIDENCE,
by children, 187.
by prisoner from dock, 521.

USAGE,
parol evidence of, admissible to explain, but not to contradict, written document, 156, 157, 165, 166, 480, 483.
must be known to contracting party to bind, 483.

V.

VALUER,
may give expert evidence, 43.

VARIATION,
of contract, 157–164, 168, 500.

VERDICT,
without judgment creates no estoppel, 395.

VIEW,
of buildings, rights of way, boundaries, etc., 329, 570, 571.

VOIR DIRE,
examination on, 170 *n*.

VOLUNTARY CONFESSIONS, 94–104.

W.

WAIVER,
of privilege by witness, 195.
client, 203.
objection to a deed by admission after inspection, 369.
as to stamps, impossible, 257, 369.
right to notice of dishonour of a bill of exchange, 372.

WEIGHTS AND MEASURES,
judicial notice of, 130.

WIFE, 20.
presumption as to marriage of, 338, 339, 342, 343.
may give evidence against her husband in criminal proceedings, when, 175–177, 181–185, 513, 514, 522.
in civil proceedings, when, 173–175, 181–182.
is not compellable to disclose communications made during marriage, 181–185, 200, 201, 248, 252.
answer question criminating husband, 194.
may claim privilege as to questions about adultery, 173–174, 199–200.
evidence of adultery by, should be corroborated, 184, 375, 455.
as to non-access, 124, 344.
admission by, is not binding on husband, except within scope of authority, 380, 381.
declaration by, as to husband's family in pedigree cases, 299–301.
husband when not accountable to, for income of her separate estate, 413.

WILL,
burden of proof, 145, 146.
how proved, 213, 222–224, 265, 266.
is not evidence without probate, 223–224.
probate copy of, 222–224, 312.
records judgment of Court as to due execution of, 312.
establishes executor's title, 223, 312.
what proof necessary to obtain probate copy of lost, 310.
as to secondary evidence of lost, 310, 495.
of personalty, 223, 224.
realty, 224, 241.
presumption as to alterations in, 340, 341, 489, 490.
clauses in, 498.
destruction of, 340.
due execution of, 243, 337, 339, 340.
may be rebutted by attesting witnesses, 340.
proof of attestation of, 241–243.
all attesting witnesses may have to be called, 241–243.
original when looked at, 223–224.
thirty years old, may prove itself, 245, 246.
construction of, 491, 499.
extrinsic evidence admissible to rebut presumption arising from construction of, 495.
provisions of Wills Act as to construction of, 490.
declarations of testator, when admissible, 310, 491–496.
evidence of intentions of testator as to, when admissible, 491–494, 497.
surrounding circumstances, when admissible, 492, 494.
though cancelled, may be evidence in pedigree cases, 302.
nicknames in a, 493, 496.
punctuation in a, disregarded, 497.

WINDING UP,
of company, proceedings on, 574, 576.

"WITHOUT PREJUDICE,"
admissions made, inadmissible, 363.
conversations, 253.
documents written, 249, 250, 252, 254, 596.
secondary evidence as to document written, inadmissible, 316.
cannot apply to charges of felony, but may in some cases of misdemeanour, 254.
effect of, as to bankrupt's notice of suspension of payment, 254.

WITNESS, 170–190, 430–445.
competent, accomplice is now, 175.
arbitrator, 90, 210.
atheists and non-believers are now, 172, 188–190.
counsel, 205–206.
deaf and dumb person is, 185.
felons are now, 172, 433.
husbands and wives in civil actions, 173, 174, 181–185.
criminal proceedings, 175–177, 182–185, 513, 514.
"infamous persons" are now, 172, 433.
informer is now, 175.
judge, 90, 210.
parties in civil actions are now, 173, 192.

WITNESS—*continued.*
competent, parties in criminal proceedings are now, 175–181.
to proceedings in consequence of adultery, 173, 174.
putative father in bastardy proceedings, 181.
competency of, is a question for the judge, 170, 181, 191.
incompetent, who used to be, 171–175.
idiots, lunatics, and very young children, 170, 185–187.
duty of judge as to, 191.
sanity of, is a question for the judge, 170.
corroboration of, when expedient, 444, 445, 450–455.
required by law, 446–451.
See CORROBORATION.
what is required to make a good, 14, 432, 433, 435–441.
may affirm instead of taking the oath, 172, 186–190, 457.
expert, 39–52, 434.
non-expert, opinion of, when admissible, 50–52, 435.
to character will not deprive prisoner of his right to the last word, 179, 520.
is privileged from action of defamation, 471.
arrest, 579.
may be arrested for contempt of Court, when, 513, 573, 580, 588.
attendance of, how enforced, 513, 530, 571–581.
See ATTENDANCE OF WITNESSES.
expenses of, 515, 580, 581, 598.
in bankruptcy, 573.
deposition of, must be read over to him and signed by him, 280, 281.
signed by magistrate, 281, 285.
may be used in subsequent proceedings, if witness dies, becomes ill or insane, etc., 68, 281, 283, 284.
for the defence, 68.
privilege of, as to matrimonial communications, 182, 200, 201.
communications with legal advisers, 201–209.
answering criminating questions, 177, 178, 192–199, 287, 512, 575, 576.
degrading questions, 198, 599.
questions about adultery, 174, 199, 200.
touching public policy, 209–210.
may be waived, 195.
claim of privilege by, raises no adverse presumption, 355.
objection by, to answer any question can only be raised by witness, 191, 194, 198.
raised after witness has been sworn, 193, 194.
attesting witness, evidence of, 47, 48, 339, 340, 435, 466.
proof of documents by, 239–243.
for prisoner, examination of, by magistrate, 285.
evidence of, by commission or letters of request, 582, 589.
statements by, at former trial, 88–91, 279–280.
may refresh memory by document otherwise inadmissible, 152.
kept away by collusion, 89, 279, 284.
how to test the veracity of, 430–445.
six sanctions of truth, 430, 431, 457.
partisan, 433, 434, 458.
expert, 39–52, 433, 434.
non-expert, 51, 52, 435.
perception of, 435, 436.
judgment of, 435, 436.

WITNESS—*continued.*
how to test memory of, 435, 436, 437.
power of expression of, 435, 437.
independent, 442.
by his demeanour in the box, 438–441.
evidence, 439, 441.
surrounding circumstances, 439, 441, 442.
corroboration of, 444, 445–455.
examination of, in chief, 457–462.
questions must be relevant, 457, 599.
to facts, 458.
leading questions not allowed, 459.
except by leave, 460.
discrediting own witness, 442, 460, 461.
refreshing memory, 462.
cross-examination of, 463, 469.
leading question may be asked, 464.
questions to credit, 33, 34, 443, 464, 468.
evidence of bad character, 433.
as to previous conviction, 34, 467, 468.
particular acts of falsehood or dishonesty, 468.
acceptance of bribe, 469.
character cannot be impeached by party calling him, 433, 442, 443, 460, 461.
unless hostile, 461.
as to former statements, 468.
transactions with third persons, 465, 466.
of an attesting witness, 466, 467.
witness called by judge, 466.
not examined in chief, 466.
to character, 522, 523.
re-examination, 469–472.
only as to matters arising out of cross-examination, 469, 470.
leading questions not allowed, 470.
as to character after attack in cross-examination, 467.
recalled to prove inconsistent statement by subsequent witness, 468.

WRITING,
grants and transfers, which must be in, 155, 156.
contract, which must be in, 155–169.

WRITTEN AGREEMENT,
evidence to vary, when admissible, 32, 158–169, 500.

Y.

YOUNG PERSON,
deposition of, under the Children Act, 1908...287–288.

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